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PROVING THE CONSTITUTION: BURDENS OF PROOF AND THE CONFRONTATION CLAUSE

Enrique Schaerer *

In law, we never prove anything to 100% certainty. For *factual* propositions, the proponent has the burden of proving them to the satisfaction of a standard: a preponderance of the evidence at the low end; clear and convincing evidence in the middle; proof beyond a reasonable doubt at the high end. The standards are often explicit. Yet, for *legal* propositions, standards are often implicit or lacking altogether. This Article argues that, to decide legal issues, courts may look to similar burdens of proof that they use to decide factual issues. They should do so informally, using burdens of proof just as rules of thumb to guide their interpretation and application of law. Whereas the standard for *statutory* law should be at least a preponderance of the evidence, the standard for *constitutional* law ought to be higher—clear and convincing evidence—because judicial decisions on the meaning and applicability of constitutional (as opposed to statutory) law are harder to change by normal democratic means. But the standard should not be so high that courts cannot say what constitutional law means or how it applies in the face of any reasonable doubt, even if the evidence weighs heavily in one direction. The evidence may include textual, historical, and logical clues. To illustrate how this theory may work, this Article looks at an example related to the Sixth Amendment Confrontation Clause, which constitutionally guarantees the right of criminal defendants to be confronted with the “witnesses” against them. The Article concludes that the Clause’s application to forensic experts, as “witnesses,” simply is not warranted by clear and convincing evidence. Courts should not have accepted that application in

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the first place, thereby avoiding doctrinal confusion and promoting popular sovereignty.

INTRODUCTION

In law, as in science, we never actually “prove” anything. We merely marshal evidence in support of a given proposition. When we say we have *proven* something, what we really mean is that we have proven it *to the satisfaction of an applicable standard*.¹ For instance, lawyers are said to prove a factual proposition if they present enough evidence to satisfy a burden of proof. The default burden in a civil case is a “preponderance of the evidence”;² in a criminal case, it is proof “beyond a reasonable doubt.”³ But other burdens may also apply, including the intermediate burden of “clear and convincing evidence.”⁴

Professor Gary Lawson has persuasively argued that burdens of proof—or standards—may apply not only to *factual* propositions, but also to *legal* ones.⁵ How and to what extent should a lawyer prove the text of a relevant law, in proper context, means *X* and not *Y*? And, if it means *X*, how and to what extent should the lawyer prove *X* applies to the fact pattern at issue?

Lawson left those questions unanswered.⁶ But they are highly relevant, especially in constitutional law where courts must often apply 18th-century law to different fact patterns. Some fact patterns are *old* in that they would have been more familiar to 18th-century interpreters. Others are *new* in that they would have been less familiar, even unimaginable, to such interpreters. In any event, the lawyer who asks the court for relief should bear the bur-

1. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 866 (1992).

2. *Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.”).

3. *Reasonable Doubt*, BLACK'S LAW DICTIONARY, *supra* note 2 (“The doubt that prevents one from being firmly convinced of a defendant’s guilt, or the belief that there is a real possibility that a defendant is not guilty.”).

4. *Evidence*, BLACK'S LAW DICTIONARY, *supra* note 2 (providing that “clear and convincing evidence” is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain”).

5. See Lawson, *supra* note 1, at 867 (considering the issue of “legal justification” and leaving for another day the question of whether, in a given case, “A broke B’s law” or not).

6. *Id.* at 860 (“I have little to say, however, about *how* that problem [of standards of proof in legal interpretation] should be resolved.”).

den to identify a law and then prove—to a *sufficient degree of certainty*—that the law means something that is applicable to the fact pattern at issue. If the lawyer can do that—establish both meaning and applicability to a requisite degree of certitude—then, and only then, should the court grant relief. If the lawyer falls short, either to demonstrate meaning or to show applicability, then the court should decline relief.

That is normal court procedure for factual propositions, and a similar approach should apply to legal propositions, albeit informally. Courts need not adopt burdens of proof to decide legal questions, as they do with factual questions. Instead, courts may simply look to the burdens of proof—from a preponderance of the evidence at the low end, to clear and convincing evidence in the middle, to proof beyond a reasonable doubt at the high end⁷—as informal heuristics, or rules of thumb, to guide their interpretation and application of law. In that way, burdens of proof would serve as “bumpers” to help keep the judiciary in its “lane” within our system of separation of powers, in which the proper role of a court is not to make or enforce law, but only to interpret law as fairly and faithfully as possible. Significantly, burdens of proof as informal rules of thumb may prove all the more useful when courts are asked, as they often are, to interpret and apply old laws to new and unforeseen facts.

Take, for example, the highly polemic interpretation and application of the Sixth Amendment Confrontation Clause. It provides criminal defendants with the right to be confronted with “witnesses” against them.⁸ At first blush, the confrontation right seems straightforward. It means criminal prosecutors must put witnesses on the stand, either at a preliminary hearing or at trial, and allow defendants to cross-examine those witnesses. Indeed, the *original* application of the right to “ordinary witnesses,” such as eyewitnesses who accused criminal defendants at the time the Confrontation Clause was drafted and adopted, is less controversial.⁹ After

7. *Evidence*, BLACK’S LAW DICTIONARY, *supra* note 2 (recognizing that “clear and convincing evidence” is “a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials”).

8. U.S. CONST. amend. VI (guaranteeing a criminal defendant the right “to be confronted with the witnesses against him”).

9. See David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*, 56 B.C. L.

all, compelling evidence suggests the framing generation drafted and adopted the Clause with the understanding it would apply to such ordinary witnesses.¹⁰ But the question becomes more controversial when issues of *unoriginal* application arise, such as whether forensic experts—who analyze evidence in laboratories, prepare reports of their findings, and may not even know the names or identities of defendants—count as “witnesses” subject to confrontation. There are reasons to believe they do and reasons to believe they do not.

The Supreme Court is deeply divided on the issue and has failed to provide courts, defendants, and prosecutors with clear guidance. Part of the problem is that the Court’s confrontation precedents, starting with *Crawford v. Washington*,¹¹ seek to apply the Confrontation Clause to declarants who did not exist and were largely unimaginable when the Clause was framed in the 18th century. Forensic evidence—from testing a substance for drugs, to measuring the concentration of alcohol in blood, to comparing DNA from a crime scene to that of a defendant—is a miracle of modern science. DNA testing did not even exist until the late 20th century. Thus, from a historical perspective, forensic experts are new and unforeseen.

The difficulty is further compounded by a sea change from the framing era to the present in not only the types of evidence, but also the rules of evidence, as well as the nature of policing and prosecuting. At the framing, hearsay was more strictly prohibited at trial, and courts recognized few hearsay exceptions.¹² Even if forensic evidence had existed then, it could not have been admitted

REV. 1899, 1949 (2015) (observing that, at the framing, the confrontation right was “understood to apply only to ordinary witnesses”).

10. *See id.*; *see also* *Crawford v. Washington*, 541 U.S. 36, 52 (2004) (holding that *ex parte* examinations of more conventional witnesses, like alleged accomplices, have long been considered “paradigmatic” confrontation violations); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 315 (2009) (reaffirming that such *ex parte* examinations constitute “paradigmatic” confrontation violations); *id.* at 344 (Kennedy, J., dissenting) (“The Framers were concerned with a typical witness—one who perceived an event that gave rise to a personal belief in some aspect of the defendant’s guilt.”); Andrea Roth, *Beyond Cross-Examination: A Response to Cheng and Nunn*, 97 TEX. L. REV. ONLINE 193 (2019) (noting that “a trial in 1719 centered mainly around eyewitnesses”).

11. 541 U.S. 36.

12. Noll, *supra* note 9, at 1904–05, 1922–23, 1927–30.

in the absence of modern hearsay exceptions like those for public records or records of a regularly conducted activity.¹³

Policing was also different at the framing. There was no professional police force like the one we know today.¹⁴ The model was more accusatory than investigatory, meaning that police often took action only when a person accused another of a crime that had already and actually (not just probably) occurred.¹⁵ Police generally did not initiate investigations on their own based on suspicion of probable crime, as they do today.

Prosecuting was far different then too. Crime victims and their families hired private lawyers to press charges on behalf of the victims.¹⁶ Public prosecutors were few, and public defenders nonexistent.¹⁷ Defendants who could not afford counsel did not have access to one and represented themselves *pro se*.¹⁸ Given the strict ban on hearsay, prosecutions relied mostly on live testimony from witnesses in court.¹⁹ Little evidence was developed out of court, as forensic evidence is by crime labs today.

Against this backdrop, the Court in *Melendez-Diaz v. Massachusetts*,²⁰ *Bullcoming v. New Mexico*,²¹ and *Williams v. Illinois*²² faced the daunting task of deciding whether and how the confrontation right applied to forensic experts. Without much historical guidance, however, the Court struggled to provide answers. The 7–2 majority it achieved in *Crawford* splintered into a 5–4 majority in *Melendez-Diaz* and *Bullcoming*, and a 4–1–4 plurality in *Williams*. Results were also inconsistent. The Court required confrontation in *Melendez-Diaz* and *Bullcoming* but not in *Williams*, articulating

13. See, e.g., FED. R. EVID. 803(6) (records of a regularly conducted activity); FED. R. EVID. 803(8) (public records).

14. Noll, *supra* note 9, at 1921.

15. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 201 (2005).

16. See Noll, *supra* note 9, at 1921–22.

17. See *id.*

18. See *id.* at 1922.

19. *Id.* at 1922–23.

20. 557 U.S. 305 (2009).

21. 564 U.S. 647 (2011).

22. 567 U.S. 50 (2012).

along the way three different tests to determine whether the confrontation right applies to forensic experts.²³

The tests may be described as the testimonial, formality, and accusatory tests. Justice Antonin Scalia, joined by Justice Ruth Bader Ginsburg and others, articulated a “testimonial test” requiring confrontation of a forensic expert who develops evidence with a primary purpose of establishing facts for future prosecution.²⁴ Justice Clarence Thomas formulated a “formality test” requiring such confrontation only where such evidence is sufficiently formalized.²⁵ Justice Samuel Alito, joined by Chief Justice John Roberts and Justices Anthony Kennedy and Stephen Breyer, urged an “accusatory test” requiring confrontation only where forensic evidence has the primary purpose of accusing a targeted individual of engaging in criminal conduct.²⁶

Thomas was the swing vote in the above cases. He concluded that forensic evidence was formal enough to require confrontation as to sworn reports by experts in *Melendez-Diaz*,²⁷ as well as an unsworn but signed report by an expert who certified the correctness of it in *Bullcoming*,²⁸ but not an unsworn yet signed DNA report by experts whose signatures did not purport to certify anything in *Williams*.²⁹ Thus, the outcome of each case hinged on the formality of forensic evidence, even though no Justice other than Thomas has adopted the formality test. Four Justices insisted in *Williams* that the testimonial test was required under prior precedents, and four offered an accusatory test instead.³⁰ Since *Williams*, the Court has failed to clarify the circumstances under which forensic experts are subject to confrontation, and the replacements of Scalia, Kennedy, and Ginsburg with Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, respectively, add to the lingering uncertainty. Will Gorsuch, Kavanaugh, and Barrett side with Scalia’s testimonial test, Thomas’s formality test,

23. See *infra* section II.B.

24. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

25. *Id.* at 840 (Thomas, J., concurring in the judgment in part and dissenting in part).

26. *Williams*, 567 U.S. at 82–83 (plurality opinion); *id.* at 97–99 (Breyer, J., concurring).

27. 557 U.S. 305, 329–30 (2009) (Thomas, J., concurring).

28. 564 U.S. 647, 664–65 (2011) (Thomas, J., joining in part).

29. 567 U.S. at 103–04, 111–12 (Thomas, J., concurring in the judgment).

30. *Id.* at 81–86 (plurality opinion) (advocating for the accusatory test); *id.* at 118–25, 141 (Kagan, J., dissenting) (advocating for the testimonial test); see *infra* notes 216–21 and accompanying text.

or Alito's accusatory test?³¹ Or will they adopt a different approach entirely?

This is an unhappy ending for the criminal justice system. It leaves courts, defendants, and prosecutors without clear guidance on the extent to which forensic experts, who develop evidence for trial, must be called to the stand and subjected to cross-examination. This, in turn, undermines the finality of criminal convictions in some of the most serious prosecutions, where forensic evidence often plays a key role. Uncertainty drives up the costs of evidence development, witness production, and proceedings at trial and on appeal. Surely, there must be a better way forward.

This Article argues that, if the Court had looked to burdens of proof as informal rules of thumb, it would never have applied the Confrontation Clause to forensic experts in the first place. The reason is that the "evidence"—textual, historical, and logical—does not prove that such experts are witnesses within the meaning of the Clause, at least not to the burden of proof that should apply in a constitutional case. The burden of proof that should apply in a constitutional case is not, as some scholars have argued, the high end of proof beyond a reasonable doubt.³² Nor is it the low end of a preponderance of the evidence. Instead, this Article argues that the burden of proof in a constitutional case should be clear and convincing evidence. That burden of proof ensures a constitutional provision will be interpreted and applied neither too loosely (so as to embrace new facts that fall outside what the framing generation contemplated and adopted by supermajority vote), nor too strictly (so as to exclude new facts that fall inside the right, power, or prohibition at issue based on fair interpretation and sound logic). That is, the intermediate burden of clear and convincing evidence is high enough to preclude unoriginal applications of the constitutional provision that are not warranted by interpretive and logical evidence, but low enough to permit unoriginal applications that are warranted by such evidence.

31. A 2018 dissent by Gorsuch from a denial of certiorari suggests he may side with the testimonial test. *See* *Stuart v. Alabama*, 139 S. Ct. 36, 37 (2018) (Gorsuch, J., dissenting from denial of certiorari).

32. *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 149–50 (1893) (arguing that courts should not overturn the acts of the political branches unless those acts are unconstitutional beyond a reasonable doubt).

The burden of proof for statutory cases may be lower, perhaps only a preponderance of the evidence, given the consequences of the interpretation and application of a statute, as opposed to a constitution, are more subject to change by “We the People” and our duly elected representatives through the democratic process. Judicial power, unlike legislative and executive power, is far more counter-majoritarian, especially at the federal level where judges are unelected, tenured, and thus never accountable to the people at the ballot box. Whereas most statutes are amended by a *simple* majority vote of the representatives we elect, or by popular referendum, most constitutions are amended by *supermajority* vote, such as by two-thirds of both houses of Congress and three-fourths of the state legislatures. That means the impact of constitutional cases tends to be far greater than that of statutory cases, so that the burden of “proving” a constitution, as opposed to a statute, should be concomitantly greater. This, in turn, promotes popular sovereignty—*both* the ability of our society to decide issues for itself by democratic choice, as opposed to judicial fiat, *and* the ability of the judiciary to preserve rights, powers, and prohibitions that were enacted by supermajority vote and thus should not be undone except by supermajority vote. The key is to balance past supermajoritarian commitments with our present simple-majoritarian values and beliefs.

This Article argues that legal interpreters of all stripes—originalists, quasi-originalists, and non-originalists—may use burdens of proof as informal rules of thumb to strike the right balance. They may do so in constitutional and statutory cases alike. The problem this Article explores is how to apply an old constitutional law to a new fact in the world. The old law is the Confrontation Clause, and the new fact is the recent emergence of forensic experts. The application of the old to the new is a challenge not only for the originalist theory that informs *Crawford* and its progeny, but also for quasi- and non-originalist theories that offer alternative ways to interpret and apply law to fact. Thus, learned judges of all persuasions stand to benefit from the use of burdens of proof as informal rules of thumb to guide whether and how litigants are able to “prove” law, in the sense that the meaning of a law is sufficiently shown to apply to the facts at issue.

This Article has three parts. Part I offers a theoretical approach for the interpretation and application of law to fact, with emphasis

on unoriginal applications where courts are asked to apply constitutional law to new facts the drafters and adopters of the law could not have considered. It argues the meaning and applicability of law should be proven to a specified degree of certainty, and that courts may use burdens of proof as informal rules of thumb to guide their interpretation and application of law. This approach rests on a normative view of law as behavior-constraining and of interpretive theory as democracy-promoting. Part II identifies a problem that may benefit from the above approach. It notes the growing controversy over the interpretation and application of the confrontation right, from more original applications to the unoriginal application of the right to forensic experts. That unoriginal application has sharply divided the judiciary and has resulted in inconsistent results that undermine criminal justice. Part III demonstrates how the use of burdens of proof as informal rules of thumb may resolve the controversy over whether the confrontation right applies to forensic experts. It concludes that, while unoriginal applications of the confrontation right to new hearsay declarants may be warranted in some cases, it is not warranted for forensic experts. The “evidence”—textual, historical, and logical—simply is not clear and convincing enough to justify such an unoriginal application.

I. BURDENS OF PROOF AS INFORMAL RULES OF THUMB

This Part offers a theory of “proving” the meaning of law, as well as its applicability to a fact pattern, to the satisfaction of recognizable standards. A preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt are three common burdens of proof used to establish factual propositions. But why limit them to factual propositions? Why not extend them to legal propositions too?

Here, the thesis is that the meaning and applicability of law should be proven to a specified degree of certainty, and that courts may use traditional burdens of proof as informal rules of thumb to guide their interpretation and application of law, especially constitutional law. The applicable burden of proof should be higher in constitutional cases, as opposed to statutory cases, since constitutions are often harder to amend than statutes. But it should not be so high, like proof beyond a reasonable doubt, as to preclude compelling unoriginal applications in which courts are quite sure—albeit not free of all reasonable doubt—that an old law applies to new

facts that the drafters and adopters of the law could never have imagined. This approach rests on a normative view of law as behavior-constraining and of interpretive theory as democracy-promoting, as set forth below.

The idea of imposing burdens of proof on legal propositions, in addition to factual ones, is not new. Professor Lawson argued nearly three decades ago that an adequate theory of interpretation must “specify the total *weight* or *magnitude* of evidence needed to establish the meaning of a given text in a given context.”³³ In other words, “a proposition is legally justified when the evidence for the proposition that is admitted and evaluated pursuant to the law’s evidentiary principles satisfies the law’s applicable standard of proof”³⁴ Lawson identified this problem of standards of proof in legal interpretation, with emphasis not on legal truth in a metaphysical sense, but on legal justification in a practical sense.³⁵ But he had little to say about “*how* that problem should be resolved,” and his aim was “not to investigate concrete problems of legal theory.”³⁶ By contrast, this Article first offers a theory to resolve the problem of standards of proof in legal interpretation and then shows how that theory may apply to a specific problem in the area of criminal procedure: whether or not forensic experts count as “witnesses” within the meaning of the Sixth Amendment Confrontation Clause.³⁷

The theory is, in a nutshell, that claims about what a constitution means, or whether it applies to a given set of facts, should be subject to something akin to a clear-and-convincing-evidence standard. By contrast, claims about a statute’s meaning and applicability should be subject only to something like a preponderance-of-the-evidence standard. Courts should look to those standards, which are already used to decide factual issues, to decide legal issues. They need not adopt the standards formally, instead only informally, as rules of thumb to help guide decisions about the meaning of law and its applicability to certain facts. Constitutional claims should be subject to a higher burden of proof than statutory claims because constitutional law is harder than statutory law to change through the normal democratic process. Whereas a statute

33. Lawson, *supra* note 1, at 859.

34. *Id.* at 866.

35. *Id.* at 867.

36. *Id.* at 860.

37. *See infra* Parts II–III.

is often enacted, amended, or repealed by simple-majority vote, constitutional change often requires something more: a supermajority vote. But it would be unwise to subject constitutional claims to a beyond-a-reasonable-doubt burden of proof. Under such a high standard, courts could not say what a constitution means or apply it to the facts if any reasonable doubt remained as to its meaning or applicability. That, in turn, may render much of the constitution ineffective, especially if, in the face of reasonable doubt, courts could not apply it to new and unforeseen facts in a fast-paced, ever-changing world. The result may be, to borrow a metaphor from the confrontation case law, constitutional “extinction.”³⁸

Thus, the theory aims to balance the need for certainty against the risk of uncertainty. The goal is to ensure that law is fixed enough to constrain legal interpreters but flexible enough to reach novel developments so that law, especially constitutional law, does not go extinct—like the dinosaurs. Both fixation and flexibility are important values for legal interpreters of all stripes. Originalists,³⁹ who argue that the meaning of a law should be fixed by what the words of the law meant at the time it was adopted,⁴⁰ strongly caution against “the caricature of originalism as a doctrine that would make it impossible to apply a legal text to technologies that did not exist when the text was created.”⁴¹ The meaning of a law remains constant for originalists, so that only its “application to new situations presents a novelty.”⁴² By the same token, “even those who aggressively eschew the label of ‘originalist,’ genuinely respect history and original meaning, at least to some degree.”⁴³ In other

38. *Davis v. Washington*, 547 U.S. 813, 830 n.5 (2006) (“Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (“[I]t is not the role of this Court to pronounce the Second Amendment extinct.”).

39. Originalism is part of textualism. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78–92, 399–402, 435 (2012). Textualism is an interpretive theory that looks for the meaning of a written law in the text of the law itself—the actual words. *Id.* at 56.

40. *Id.* at 78.

41. *Id.* at 85–86.

42. *Id.* at 86 (“Drafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances that they could not possibly envision”); *see also* Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 871 (“All forms of originalism must take technological change into account.”).

43. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 753 (2011); *see also* Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1205 (2012) (noting that, in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), Justices Brennan and

words, history still provides fixed data points for non-originalists. Thus, insofar as the theory here attempts to balance the interpretive values of fixation and flexibility, it should have wide appeal.

This theory rests on several critical distinctions, including that between fact and law, word sense and word reference, original application and non-original application, constitutionalism and democracy, as well as extinction and anti-extinction. Each distinction is explained below, as is its connection to the broader theoretical framework of using burdens of proof as informal rules of thumb to guide the interpretation of law and, more so, the application of law to fact—especially novel fact patterns with no clear historical analogues.⁴⁴

A. *Fact Versus Law*

Few distinctions are more “deeply ingrained” in our Anglo-American legal tradition than that between questions of fact and questions of law.⁴⁵ At a high enough level of abstraction, the distinction may seem arbitrary or illusory,⁴⁶ especially given that “every positive propositional claim about the law . . . is a factual claim of one sort or another.”⁴⁷ For example, a legal claim that “the law means *X*” or “the law applies to *Y*” is at some level a factual claim too. But the distinction, whatever its drawbacks, provides a critical “tool for allocating decisionmaking authority in a complex, layered legal system.”⁴⁸ Here, a “fact” will refer to “an aspect of reality” other than a “law,” which will refer to an aspect of “the

Marshall “wrote strikingly nonoriginalist opinions in which they concluded that capital punishment had become inconsistent with the Eighth Amendment, but even these opinions started with framing-era practice and understandings”).

44. See, e.g., Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL’Y 479, 480 (1996) (“Old rules necessarily post hard questions when they encounter novel contexts . . .”).

45. Lawson, *supra* note 1, at 862 & nn.7–9 (noting fact-law distinctions in our customary practices, as well as our statutory and constitutional laws).

46. Compare *Question of Fact*, BLACK’S LAW DICTIONARY, *supra* note 2 (defining “question of fact” as an “issue that has not been predetermined and authoritatively answered by the law”), with *Question of Law*, BLACK’S LAW DICTIONARY, *supra* note 2 (defining “question of law” as a question “the law itself has authoritatively answered”); compare *Question of Fact*, BLACK’S LAW DICTIONARY, *supra* note 2 (defining “question of fact” as a “disputed issue to be resolved by the jury in a jury trial or by the judge in a bench trial”), with *Question of Law*, BLACK’S LAW DICTIONARY, *supra* note 2 (defining “question of law” as an “issue to be decided by the judge, concerning the application or interpretation of the law”).

47. Lawson, *supra* note 1, at 863.

48. *Id.* at 862–63.

body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them.”⁴⁹ For simplicity, the discussion will bracket mixed questions of law and fact.⁵⁰ In a sense, every case may entail a mixed question of law and fact insofar as, to resolve the case, a court must determine whether a certain law applies to particular facts.

Professor Lawson recognized that a standard of proof applies to every proposition, whether factual or legal,⁵¹ but observed that those standards are far more explicit and integral in our legal system to the resolution of factual propositions than legal propositions.⁵² For legal propositions, the standards are often left unstated and unspecified.⁵³ This does not mean that a standard is not operative in the interpretation and application of law, but it does mean that the operation of the standard remains implicit, perhaps even unthinking. Given that courts are already applying a standard whenever they interpret and apply the law,⁵⁴ they might as well give more careful consideration to what that standard should be and which party should bear the burden of it.

As for what the standard should be to interpret a law and apply it to a set of facts, courts may look to the three justificatory inquir-

49. See BLACK’S LAW DICTIONARY, *supra* note 2 (offering various definitions for “fact” and “law”).

50. Lawson, *supra* note 1, at 863 n.10 (noting “the difficulty of classifying so-called ‘mixed’ questions of law and fact, such as whether the defendant’s conduct in a particular case constituted negligence”).

51. *Id.* at 874–75 (“[A]ny knowledge claim about a proposition, including a claim of ignorance or agnosticism, presupposes not only principles of admissibility and significance, but also some governing standard of proof.”).

52. *Id.* at 860 (noting that standards of proof are “essential” to resolve questions of fact); see also *id.* at 867–71 (exploring the structure of factual proof).

53. *Id.* at 877 (“The American legal system does not specify an appropriate standard of proof (or allocation of the burden of proof) for every proposition of law that arises in adjudication, as it does for propositions of fact.”); see also *id.* at 882 (“Notwithstanding the epistemological parallels between factual and legal propositions, in those instances in which the law has asserted and defended standards of proof for legal propositions, it has done so largely without reference to the governing standards for proof of facts.”). *But see id.* at 895 (“The law . . . seems *tacitly* to have adopted a best-available-alternative standard of proof for legal propositions.” (emphasis added)).

54. *Id.* at 877 (“The absence of such specification, however, does not mean that no standard of proof is operative. Indeed, to the extent that statements of law are propositional in nature, some standard *must always* be operative, whether or not it is acknowledged by decisionmakers or scholars.”).

ies they already rely on to resolve questions of fact: (1) “admissibility,” which asks what did a court count, or not count, as evidence;⁵⁵ (2) “significance,” which asks how heavily did the court count it;⁵⁶ and (3) “magnitude,” which asks what quantity and quality of evidence did the court require to hold that “the law means *X*” or “the law applies to *Y*.”⁵⁷ The “magnitude” inquiry, which directly relates to burdens of proof, is the focus of the theoretical framework here. The “admissibility” and “significance” inquiries, albeit closely related to burdens of proof, are beyond the scope of this Article.

In considering what quantity and quality of proof is enough to establish a legal proposition, courts need not “reinvent the wheel.” They may look to burdens of proof that they already use for factual propositions. A *burden of proof* refers to a “party’s duty to prove a disputed assertion.”⁵⁸ As set forth above, there is no principled reason why the disputed assertion could not be legal, rather than factual. In any event, a burden of proof includes both a burden of production and a burden of persuasion.⁵⁹ A *burden of production*, which may shift from the party asking the court for relief, is a “sufficiency standard.”⁶⁰ The party must show that it has enough evidence that it *may* persuade the factfinder, either the jury in a jury trial or the judge in a bench trial.⁶¹ By carrying the burden of production, the party earns the right to have the trier of fact consider and weigh the evidence.⁶² A *burden of persuasion*, which does not generally shift from the party seeking relief, is a standard of persuasion.⁶³ The evidence the party marshals *must* persuade the factfinder of a fact to a specified degree of certainty, including by a preponderance of the evidence, clear and convincing evidence, and

55. *Id.* at 871.

56. *Id.*

57. *Id.*

58. *Burden of Proof*, BLACK’S LAW DICTIONARY, *supra* note 2.

59. *Id.*; see also 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 3:2, at 415 (4th ed. 2013) (noting that a burden of proof “embraces two related but different concepts”).

60. 1 MUELLER & KIRKPATRICK, *supra* note 59, § 3:4.

61. *Id.*

62. *Id.*

63. *Id.* § 3:2.

proof beyond a reasonable doubt.⁶⁴ This Article uses the term “burden of proof” primarily in the sense of a burden of persuasion, rather than just a burden of production.

Consider the three most common burdens of proof. At the low end, a *preponderance of the evidence* means that a jury must believe that the facts asserted by the proponent are “more probably true than false.”⁶⁵ In the middle range, *clear and convincing evidence* means that the jury must believe that the truth of the facts asserted by the proponent is “highly probable.”⁶⁶ At the high end, *proof beyond a reasonable doubt* means the facts asserted are “almost certainly true.”⁶⁷ Rhode Island’s Supreme Court has neatly summarized the relationship among the various burdens of proof:

The phrase “clear and convincing evidence” is more than a mere exercise in semantics. It is a degree of proof different from a satisfaction by a “preponderance of the evidence” which is the recognized burden in civil actions and from proof “beyond a reasonable doubt” which is the required burden in criminal suits. If we could erect a graduated scale which measured the comparative degrees of proof, the “preponderance” burden would be at the lowest extreme of our scale; “beyond a reasonable doubt” would be situated at the highest point; and somewhere in between the two extremes would be “clear and convincing evidence.”⁶⁸

This Article does not consider the extent to which the above three burdens of proof are, in fact, useful to resolve factual disputes. Given the widespread use of those burdens, this Article assumes their utility. The argument here is that the burdens of proof that are used to help resolve factual disputes may and should be used to help resolve legal disputes. Courts need not adopt those standards formally; they need only look to the standards informally, as rules of thumb to help determine whether there is enough “evidence” or “proof” to persuade them that “the law means *X*” or, more so, that “the law applies to *Y*.” Such evidence or proof may come in various forms, including textual, historical, and logical. Textual evidence looks to the actual words of a written law in proper gram-

64. For a survey of the three most common burdens of proof, see *id.* §§ 3:2, 3:5, 3:17.

65. See, e.g., *Parker v. Parker*, 238 A.2d 57, 61 (R.I. 1968); see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328–29 (2007) (describing a preponderance of the evidence as a “*more likely than not*” standard).

66. See, e.g., *Parker*, 238 A.2d at 61.

67. See, e.g., *id.*

68. *Id.* at 60–61.

matical context, and as part of a broader body of related law. Historical evidence looks to the surrounding circumstances in which the law was drafted and adopted, as well as early interpretations of its meaning or applications of it to past fact patterns that may offer some insight into the law's proper meaning and application in a present case. Logical evidence looks to the validity and soundness of the logic regarding the law's meaning and applicability, and whether any analogies are possible to past interpretations and applications of the law to similar facts.⁶⁹ For guidance here, legal interpreters may rely on well-established canons of interpretation.⁷⁰ Different types of legal texts, especially governmental laws, have their own unique canons.⁷¹ No canon is by itself absolute; each is just a clue,⁷² like the clues in a murder mystery.⁷³

As for who should bear the burden of proof regarding the interpretation and application of a law, the burden should fall on any and all parties who ask a court to make a finding about the law's meaning and applicability. In other words, the proponent of a legal proposition should bear the burden of proof, regardless whether the proponent is plaintiff or defendant, movant or nonmovant, appellant or appellee, petitioner or respondent. If the proponent cannot show to the required degree of certainty that the legal proposition is true—for example, that “the law means X” or that “the law applies to Y”—then, by default, the court should decline to accept that legal proposition.⁷⁴ This does not mean that the opposite is true, that “the law does not mean X” or that “the law does not apply to Y.” Instead, it means only that the court has not reached the

69. “Validity” refers to whether a conclusion follows from its premises, and “soundness” to whether the premises are acceptable. IRVING M. COPI, *INTRODUCTION TO LOGIC* 33 (4th ed. 1972).

70. See SCALIA & GARNER, *supra* note 39, at 69–139 (semantic canons), 140–66 (syntactic canons), 167–239 (contextual canons).

71. See *id.* at 241–339 (setting out “principles applicable specifically to governmental prescriptions”).

72. *Id.* at 59–62 (discussing the principle of interrelating canons).

73. Supreme Court Fellows Alumni Ass'n, *Supreme Court Fellows Program Annual Lecture* at 19:49, YOUTUBE (Mar. 5, 2015), <https://www.youtube.com/watch?v=Ml3Lfp6irpk> [<https://perma.cc/Z74D-BS3U>] (Justice Scalia: “[Y]ou should not think that any one of the canons that we're going to discuss is dispositive; each one of them is a clue. And just as . . . the clues in a murder mystery don't all point in one direction—you know, some point at the butler, some point at . . . the maid—so also in the interpretation of texts.”).

74. See *Burden of Proof*, BLACK'S LAW DICTIONARY, *supra* note 2 (providing an alternative definition of “burden of proof” as “a proposition regarding which of two contending litigants loses when there is no evidence on a question or when the answer is simply too difficult to find”).

issue since, based on the textual, historical, or logical “evidence” or “proof,” the court lacks the necessary conviction to make a determination one way or the other. In this way, the allocation of the burden of proof serves as a sort of “tie breaker.” A tie requires a court not to accept a legal proposition, but it does not establish the opposite of that legal proposition. Professor Lawson explained it as follows:

Failing to conclude that X is legally true is not the same thing as concluding that X is not legally true. If one reaches no conclusion at all, one has not concluded that X is legally true, but one has also not concluded that X is not legally true. Rather, one has concluded nothing.⁷⁵

In sum, the standard of proof is the degree of certainty that must be shown for a factual proposition to be accepted, and the burden of proof identifies who loses, or what happens, when enough uncertainty remains. For factual propositions, “the law specifies the requisite standards of proof and also prescribes a rule of decision for the zone of uncertainty in which those standards preclude a definitive true-or-false answer.”⁷⁶ Simply put, “[i]f the applicable interpretive theory yields no determinate answer, the party with the burden of proof loses.”⁷⁷ Why not with legal propositions too?

This Article argues that standards and burdens should apply to legal propositions, in addition to factual propositions. The selection of a standard, in particular, “may be of interest to at least some of the participants in the ongoing debate over legal indeterminacy—the debate over the extent to which legal theories can yield single right answers or identifiable ranges of right answers to legal questions.”⁷⁸ Indeed, “[r]ational debate on determinacy . . . cannot take place without reference to standards.”⁷⁹ The specification of a standard for constitutional and statutory questions of law, as well as the allocation of the burden, may shed some light on what is and is not legally determinate. As set forth above, the standard should be a preponderance of the evidence for statutory questions of law, on the one hand, and clear and convincing evidence for constitutional questions of law, on the other hand, and the burden should

75. Lawson, *supra* note 1, at 896; *see also id.* at 895–96 (noting that “[a]ny system that employs an absolute standard thus leaves open the possibility that *no* interpretation will satisfy the standard, effectively leaving no law in such cases”).

76. *Id.* at 871.

77. *Id.* at 875 n.51.

78. *Id.* at 876 (footnote omitted).

79. *Id.* at 877.

be on the proponent of a legal proposition. The focus is on what quantity and quality of evidence should be necessary not only to say what a law means, but also (and more so) to say whether the law does or does not apply to a given set of facts. And this is where the sense-reference distinction comes into play.

B. *Sense Versus Reference*

The distinction between a word's sense and reference is longstanding in the philosophy of language. A key figure is Gottlob Frege, who refined the distinction in the 19th century.⁸⁰ His sense-reference distinction is like the distinction John Stuart Mill drew between denotation and connotation,⁸¹ and Rudolph Carnap drew between intension and extension.⁸² Here, the focus is simply on Frege's sense-reference distinction. Professor Christopher Green has developed that distinction in constitutional theory, explaining that the Fregean *sense* of a word "gives the word's cognitive value," and its Fregean *reference* is "the tangible actual thing in the world that the word picks out."⁸³ Legal interpreters look for sense first and reference next, even if they do not think of the search for sense and reference as two distinct steps.

Consider, for example, how originalists like the late Justice Scalia may endeavor to interpret the text of the Bill of Rights. Scalia is relevant because his originalist interpretive theory has heavily influenced the jurisprudence on the Sixth Amendment Confrontation Clause,⁸⁴ the case study presented in Parts II and III below. First, originalists like Scalia look for word sense in the form of original meaning, which is the cognitive value the words at issue had when they were adopted in the 18th century. Originalists

80. GOTTLob FREGE, *On Sense and Reference*, in TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLob FREGE 56 (Peter Geach & Max Black eds., Max Black trans., 2d ed. 1960) (first published as *Über Sinn und Bedeutung*, 100 ZEITSCHRIFT FÜR PHILOSOPHIE UND PHILOSOPHISCHE KRITIK 25 (1892)).

81. 1 JOHN STUART MILL, A SYSTEM OF LOGIC 34–41 (8th ed. 1872).

82. RUDOLF CARNAP, MEANING AND NECESSITY § 40, at 177–78 (1947).

83. Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 563 (2006).

84. See, e.g., Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1657 (2016) (noting "an identifiably originalist turn"); Akhil Reed Amar, Heller, HLR, and *Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 152 (2008) (noting "alignment" with original meaning); Antonin Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL'Y 871, 871–72 (2008) (describing his majority opinion in *Crawford v. Washington*, 541 U.S. 36 (2004), as "thoroughly originalist").

may not always agree on what the original meaning was,⁸⁵ or even if there was one,⁸⁶ especially where the historical record is missing or conflicting. But the quest for original meaning is nonetheless a search for word sense. Second, originalists must consider word reference, which asks whether the original meaning does or does not apply to the facts of the case at hand. The bottom line is that sense refers to the meaning of a law, whereas reference refers to the applicability of the law to given facts.

For originalists, an old law can apply to new facts because of the sense-reference distinction, whereby a fixed sense has a non-fixed reference: “The meaning of rules is constant. Only their application to new situations presents a novelty.”⁸⁷ As Green put it, “the sense of a constitutional expression is fixed at the time of the framing, but the reference is not, because it depends on the facts about the world, which can change.”⁸⁸ That sense is fixed and reference is not, at least with respect to new facts, may be rather uncontroversial among originalists. Scalia, for example, recognized that a fixed sense “doesn’t mean there aren’t new things that come up,” and that reference may be variable in those cases because, “of course, you have to apply the text to new phenomena, which the founding generation didn’t even know about.”⁸⁹ But he disputed whether reference was so variable with respect to old and familiar facts—the “extant phenomena” that existed during the framing era.⁹⁰ He did so based on a normative view of law as behavior-constraining and of interpretive theory as democracy-promoting:

In its most important aspects, most of which are in the Bill of Rights . . . , the Constitution tells the current society that it cannot do what it wants to do. It is a decision that the society has made that, in order to take certain actions, you need the extraordinary effort that it takes to amend the Constitution. Now, if you give to those many provisions

85. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* (noting “disagreement regarding the original meaning”), in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 45 (Amy Gutmann ed., 1997).

86. Jack M. Balkin, *The Construction of Original Public Meaning*, 31 *CONST. COMMENT.* 71, 71, 73 (2016) (arguing the Recess Appointments Clause at issue in *NLRB v. Noel Canning*, 573 U.S. 513 (2014), had “no original public meaning”).

87. SCALIA & GARNER, *supra* note 39, at 86.

88. Green, *supra* note 83, at 560 (emphases omitted).

89. Univ. of Cal. Hastings Coll. of the Law & Cal. Lawyer, *Legally Speaking: Antonin Scalia* at 14:13, *YOUTUBE* (Sept. 17, 2010) [hereinafter *Legally Speaking*], <https://www.youtube.com/watch?v=KvttIukZEtM> [<https://perma.cc/YQU4-SKN3>].

90. *Id.* at 14:23.

of the Constitution that are necessarily broad, such as “due process of law,” “cruel and unusual punishments,” “equal protection of the laws,” . . . an evolving meaning, so that they have whatever meaning the current society thinks they ought to have, they are no limitation on the current society at all.⁹¹

Scalia asked, for example, whether the death penalty is cruel and unusual in violation of the Eighth Amendment. His answer: “Who ever voted to make it impossible to have the death penalty? . . . Nobody. You make out of the Constitution something that it was never meant to be” where, as here, a fixed sense is applied to facts known to the framing generation and that they apparently never voted to include as a reference within the fixed sense of even a vague provision like the Cruel and Unusual Punishments Clause.⁹²

Based on the philosophy of language, especially the sense-reference distinction, Green describes Scalia’s approach as far too deferential to the framing generation’s apparent understanding of sense and reference: “The Founders’ actions, for Scalia, are the best possible evidence of the meaning of their language.”⁹³ Instead, Green argues that “[i]nterpreters should . . . give founders’ assessments of reference only *Skidmore*-level deference,”⁹⁴ a standard of deference from the administrative-law context.⁹⁵ He means that framing-era assessments of reference,

while not controlling . . . by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.⁹⁶

Thus, Green sees framing-era assessments of reference as persuasive, not controlling: “While the framers are fallible regarding the reference of their constitutional language, they are still extremely useful guides.”⁹⁷ But one may object that his proposed administrative-law standard of deference has no place in a democratic context.

91. *Id.* at 12:38.

92. *Id.* at 14:29.

93. Green, *supra* note 83, at 555, 557 (emphases omitted).

94. *Id.* at 555, 591–92.

95. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (setting standard for deference to an agency’s interpretation of a statute that does not delegate authority to the agency).

96. *Id.*

97. Green, *supra* note 83, at 560.

After all, the framing generation voted for the Constitution based on some public understanding, more widely held or less, of what the reference of constitutional language included and excluded among the extant phenomena that existed in the 18th century.

If, for example, the framing generation did not think the death penalty was cruel and unusual, then one may argue that the original meaning of the Eighth Amendment does not include the death penalty. Indeed, Scalia argued that the Eighth Amendment means not “whatever may be considered cruel from one generation to the next,” but what the framing generation considered cruel when the Eighth Amendment was adopted.⁹⁸ Otherwise, he explained, the Eighth Amendment “would be no protection against the moral perceptions of a future, more brutal, generation.”⁹⁹ Thus, Scalia saw framing-era assessments of reference as more controlling for extant phenomena that existed in the 18th century, as opposed to novel phenomena that did not exist then. The result is that originalists like Scalia view reference as more fixed for the old and less so for the new. The only limit on reference for the new is whether it fairly fits, by interpretation and logic, into the fixed sense of original meaning.

From a democracy-promoting view of originalism, that makes sense and *Skidmore* deference does not. If *X* and *Y* are facts that existed in the framing era, if the framing generation adopted a constitutional law thinking it referred to *X* and not *Y*, and if the text can reasonably bear that meaning, it should not matter whether the framing generation was thorough in its consideration, valid in its reasoning, and otherwise satisfied the other *Skidmore* factors. Unless the historical evidence plainly suggests the framing generation voted for what they understood to be an evolving principle that could someday refer to the opposite, which Scalia saw as highly unlikely, the law refers to *X* and not *Y*. Fallibility has nothing to do with it. The adopters could have been mistaken, even wrong, about their understanding of *X* and *Y*, but the law still re-

98. Antonin Scalia, *Response, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 85, at 129, 145.

99. *Id.*

fers to *X* and not *Y* so long as that was their understanding of original meaning, and the text of the law can reasonably bear that meaning.¹⁰⁰ That is democracy.

This is what the philosophy of language misses. The adoption of law by majority—or supermajority—vote is an act of democracy, not philosophy. The interpretation and application of law is therefore subject not only to “the rules of language,” but also to “the rules of law.”¹⁰¹ It is a judicial act within a governmental framework, not just a linguistic exercise in which the philosophy of language, by itself, governs. Even if the text of the above law can be viewed, philosophically, at a high enough level of generality to refer to something other than to *X* and not *Y*—such as to both *X* and *Y*, neither *X* nor *Y*, or *Y* and not *X*—that is not permissible from a democratic perspective that seeks to honor what the framing generation understood and adopted by vote. To construe the law to refer to something other than to *X* and not *Y* would defy that popular will in decidedly undemocratic terms. The thrust is that, in the normal course, reference should be fixed for extant phenomena, even if it is not fixed for novel phenomena.

If so, legal interpreters must still decide how a fixed sense of original meaning applies, if at all, to non-fixed references in the context of new and unforeseen facts. Consider a simple example, in which a given law prohibits “driving a car or truck without a driver’s license.” Assume that, when the law was adopted, sport utility vehicles did not yet exist. When SUVs are later developed, does the prohibition apply to them? It seems reasonable to think the prohibition does apply. Indeed, the phrase “car or truck” appears to be a synecdoche for all “motor vehicles.”¹⁰² But does the

100. See JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 119 (2005) (noting that, although framing-era understandings may be mistaken, “there is another sense in which [they] can never be mistaken”); *id.* at 129 (noting that a mistaken “understanding of how the First Amendment applies to a certain posited set of facts . . . would remain as decisive and as definitive as before”).

101. SCALIA & GARNER, *supra* note 39, at 53 (quoting H.T. Tiffany, *Interpretation and Construction*, in 17 *AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW* 1, 2 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1900)); *cf.* Lawson, *supra* note 1, at 878 (“Even if all of the philosophers in the world maintained that, in some ultimate sense, knowledge is indeed impossible, people would still have to act, and the legal system would still have to muddle through as best it could.”).

102. *Cf.* Scalia, *supra* note 85, at 37–38 (“Take, for example, the provision of the First Amendment that forbids abridgment of ‘the freedom of speech, or of the press.’ That phrase does not list the full range of communicative expression. Handwritten letters, for example, are neither speech nor press. Yet surely there is no doubt they cannot be censored. In this

prohibition apply to self-driving cars that are fully autonomous in that no person who might need a driver's license actually does any "driving"? That seems a far more difficult question, for which the evidence may be insufficient for a court to conclude that the old law applies to the new fact, at least not to the required degree of certainty. If the proponent of the legal proposition cannot satisfy the standard of proof, whatever it may be, the court should decline to accept the legal proposition because the proponent should bear the burden of proof. So, for example, if a prosecutor cannot sufficiently persuade a judge that the above prohibition applies to the operator of a self-driving car, the court should not fine or otherwise punish the operator for failure to have a driver's license (especially given the rule of lenity in criminal cases). Nor should the court hold that the prohibition does not apply to the operator of a self-driving car, unless the operator can sufficiently persuade the judge that the prohibition does not apply. Instead, where neither party can satisfy the standard of proof for a legal proposition, the court should simply decline to accept a legal proposition one way or the other, and then rule against the party who bears the burden of proof.

This rule of decision is especially important for borderline cases where the meaning of a law, or its applicability to given facts, has not been shown to the satisfaction of the standard of proof: "[A]lthough it may at first seem easy to untrained common sense to pronounce that some acts are within the prohibition of the law and others are not, there will and must be cases near the borderline which are not obviously on either one side or the other."¹⁰³ In those cases, the party who bears the burden of proof should lose if that party cannot satisfy the applicable standard of proof.

constitutional context, speech and press, the two most common forms of communication, stand as a sort of *synecdoche* for the whole." (emphasis added)); Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1376–77 (1997) ("At the time all three ('press,' 'army,' and 'navy') were written, all three marked out the full range of each kind. There were no televisions, but likewise, there was no device of publication in 1791 that was not within the reach of 'the press.' There was no airforce, but 'army' and 'navy' marked out the full range of the armed forces. Both terms when written were exhaustive of the category that they described." (first citing U.S. CONST. amend. I; and then citing U.S. CONST. art. I)).

103. SCALIA & GARNER, *supra* note 39, at 54 (quoting FREDERICK POLLOCK, *A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW* 224–25 (1896)).

C. *Original Application Versus Unoriginal Application*

The distinction between original and unoriginal application is just a more fine-grained version of the sense-reference distinction. Sense refers to the interpretation of a law to determine the meaning of the words of the law, and reference refers to the application of the meaning of the words of the law to certain facts in the world.¹⁰⁴ At the level of reference, there are two different types of application of law to fact. One is *original* application, by which a law is applied to a fact pattern that existed at the time when the law was drafted and adopted. Historical evidence from that time may exist regarding whether or not those who drafted and adopted the law understood it to apply to that fact pattern. The other type is *unoriginal* application, by which a law is applied to a new fact pattern that did not exist at the time the law was drafted and adopted. No framing-era evidence is available for such an application. The best a legal interpreter can do is rely, if possible, on an analogy to similar fact patterns in existence during the framing era. Less historical evidence invites more logical argument, however strong or weak.

This distinction between original and unoriginal application tracks the distinction Justice Scalia drew between cases addressing “extant” phenomena that were in existence at the framing and those considering “novel” phenomena that did not come into existence until later.¹⁰⁵ Scalia said original application of law to extant phenomena, such as whether the death penalty is cruel and unusual under the Eighth Amendment, is easier since we may have direct evidence of what the framing generation thought about the

104. This is not so different from Professor Randy Barnett’s interpretation-construction distinction. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011) (defining interpretation as “identifying the semantic meaning of a particular use of language in context,” and construction as “applying that meaning to particular factual circumstances”); see also Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 495–524 (2013) (arguing that construction occurs where “text is given legal effect”); cf. JACK M. BALKIN, *LIVING ORIGINALISM* 4–5 (2011) (arguing that interpretation is “the ascertainment of meaning,” while construction entails “build[ing] out the American state over time” by “arguments from history, structure, ethos, consequences, and precedent”); KEITH WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 3–9 (1999) (viewing construction as a political process that fills in “textual indeterminacies”). *But see* SCALIA & GARNER, *supra* note 39, at 13–15 (dismissing the “supposed distinction” between interpretation and construction and arguing that interpretation includes an inquiry into both the meaning and applicability of law to fact).

105. See *supra* notes 89–92, 98–99 and accompanying text.

phenomenon in question.¹⁰⁶ If so, direct evidence may help proponents of a legal proposition more easily meet the applicable standard of proof—either a preponderance of the evidence for application of a statute, or clear and convincing evidence for application of a constitution.

Green is partly right to say that, for Scalia, framing-era assessments were “the best possible evidence” of original meaning and, in turn, proper application.¹⁰⁷ That was true of Scalia for original applications. In fact, Scalia did not just consider those assessments “the best possible evidence” as to the extant; he saw them as “conclusive” in some cases: “[P]rovision for the death penalty in a Constitution that sets forth the moral principle of ‘no cruel punishments’ is *conclusive* evidence that the death penalty is not (in the moral view of the Constitution) cruel.”¹⁰⁸ In most cases, however, he saw them as the best evidence of “import”—the meaning the framers meant to convey and the framing generation meant to adopt by the words the framers chose to use in a given law.

But the application of original meaning to novel phenomena is different. Unlike for original application, legal interpreters should have little, if any, direct evidence for an unoriginal application of a law to new and unforeseen facts. For unoriginal application, the only evidence may be indirect—or, to borrow a term from evidence law, “circumstantial.”¹⁰⁹ Thus, an unoriginal application may be somewhat less likely to satisfy the applicable standard of proof than an original application. When interpreters apply a law to old facts, they may often (but not always) draw on direct evidence of meaning and applicability.¹¹⁰ But they have no direct evidence, and may rely only on circumstantial evidence, when applying a law to new facts. They must apply law to fact in either case, but the quantity and quality of evidence is not the same in both cases. Evidence for original application, compared to that for unoriginal application, is often quantitatively and qualitatively superior. The distinc-

106. See *supra* notes 89–92 and accompanying text.

107. Green, *supra* note 83, at 557.

108. Scalia, *supra* note 85, at 146 (emphasis added).

109. WILLIAM PAYSON RICHARDSON, *THE LAW OF EVIDENCE* § 111, at 68 (3d ed. 1928) (“Evidence . . . from which the existence or non-existence of the fact in question may be inferred as a probable consequence, is termed circumstantial evidence.”).

110. Direct evidence may still be quite scarce for original application, as with the Recess Appointment Clause. See *supra* note 86 and accompanying text.

tion between original and unoriginal application is thus important.¹¹¹ To be sure, both entail a search for Fregean reference. But the quantity and quality of evidence is different. Generally, original application should enjoy more and better evidence than unoriginal application.

Partly since Scalia saw a distinction, however strong or slight, between the application of law to extant and novel facts, scholars criticized him for adhering not to original meaning but to original *expectation*. Professor Ronald Dworkin said Scalia followed not “semantic’ originalism,” which “insists that the rights-granting clauses be read to say what those who made them intended to say,” but “expectation’ originalism,” which “holds that these clauses should be understood to have the consequences that those who made them expected them to have.”¹¹² That mischaracterizes the point about original application in a democratic context. What is important is not the meaning the framers expected their words to have, but the meaning the framing generation understood those words to have when it voted to adopt them as law.¹¹³ That is, original public meaning is a function of original public understanding,¹¹⁴ but not decisively so.¹¹⁵ It depends on whether the evidence, including the history, satisfies the applicable standard of proof.

111. Green, *supra* note 83, at 561 (noting that law is in “the distinction business”).

112. Ronald Dworkin, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 85, at 115, 119; *see also* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–97, 295 n.9 (2007) (accusing Justices Scalia and Thomas of following “original expected application”).

113. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 60 (1999) (“In ratifying the [Constitution], the people appropriated it, giving its text the meaning that was publicly understood.”).

114. SCALIA & GARNER, *supra* note 39, at 33 (explaining that a legal interpreter must “determin[e] the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued”); *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting) (noting the parallel between original meaning and original understanding); *Utah v. Evans*, 536 U.S. 452, 491 (2002) (Thomas, J., concurring in part and dissenting in part) (same); *cf.* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) (describing original meaning as “the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted”); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 607–10 (2004) (providing a similar description).

115. Many scholars have rejected original-expected-applications originalism, at least as conclusive. *See, e.g.*, Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, 1398 (arguing that “it is the semantic original public meaning of the enacted texts that should govern”); John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 781 (“We do not say that

The point is that framing-era assessments, though not conclusive, should weigh heavily on the meaning of a law and its application to fact. Those assessments may be available for original applications, but not for unoriginal applications—even if close analogies to similar historical phenomena may be possible (and persuasive) for some unoriginal applications. The difficulty of unoriginal application may be further compounded where one attempts to apply a law to a fact pattern that is *radically* new and unforeseen, such as a shocking discovery. Without the benefit of direct evidence of relevant framing-era assessments, the proponent of a legal proposition must resort to other evidence to satisfy the applicable burden of proof. Although canons of interpretation and rules of logic may be helpful to that end, the quantity and quality of evidence may be less persuasive—all other things being equal—for unoriginal application versus original application.

D. *Constitutionalism Versus Democracy*

Here, the theory is that courts should decide questions of law like they decide questions of fact—that is, with the aid of burdens of proof. But they need not adopt burdens of proof formally, as they often do with questions of fact. Instead, they need only look to burdens of proof informally, as rules of thumb, to decide questions of law. There are two basic legal questions that courts must answer to decide cases. First, what does the law mean? Second, does the law apply to the facts in the case at hand? The burden should be on the proponent of the legal proposition at issue, and the standard should be higher in regard to the meaning and applicability of a constitution, rather than a statute. The reason is that a constitution is generally harder to change than a statute through the normal democratic process. In the normal course, constitutional

the meaning of words or the content of original methods are constituted by original expected applications, nor do we believe that they have to remain close to any particular expected application or set of applications.”). *But see* Steven D. Smith, *That Old-Time Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 223, 223–25 (Grant Huscroft & Bradley W. Miller eds., 2011); Scalia, *supra* note 98, at 144–45 (rejecting “expectation originalism”); Steven D. Smith, *Meanings or Decisions? Getting Originalism Back on Track*, LIBERTY L. BLOG (Dec. 2, 2014), <https://lawliberty.org/forum/meanings-or-decisions-getting-originalism-back-on-track/> [https://perma.cc/AB5P-VPC3] (arguing for “original decisions originalism”).

change requires a supermajority vote, while statutory change requires only a simple-majority vote. And this brings us to the distinction between constitutionalism and democracy.

Many commentators and scholars have argued that constitutionalism is *countermajoritarian*.¹¹⁶ It is not. It is, more precisely, *supermajoritarian*.¹¹⁷ That is, constitutionalism upholds law adopted by a past supermajority in the face of contrary law adopted by a present simple majority. The rule of constitutionalism is that the will of a past supermajority cannot be undone by the will of a present simple majority. Only a present supermajority can undo what a past supermajority has wrought.¹¹⁸ Federal law offers a helpful illustration. The U.S. Constitution, by its own terms, did not go into effect until nine out of the thirteen original states adopted it by convention.¹¹⁹ That translates into a supermajority threshold of nearly 70% of state conventions. While Congress may pass a law by a simple-majority vote of over 50% of both houses of Congress, the Constitution cannot be amended except by a supermajority vote—generally, two-thirds of both houses of Congress and ratification by three-fourths of the state legislatures.¹²⁰ That translates into a supermajority threshold of nearly 67% of both houses of Congress and 75% of the state legislatures. Clearly, constitutional change is harder to effect than statutory change through the normal democratic process.

116. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). But see RUBENFELD, *supra* note 100, at 96 (“Constitutionalism, although counter-majoritarian, is not counter-democratic.”).

117. John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 710 (2002) (describing the Constitution as “supermajoritarian”).

118. See WHITTINGTON, *supra* note 113, at 135 (“[T]he people emerge at particular historical moments to deliberate on constitutional issues and to provide binding expressions of their will, which are to serve as fundamental law in the future when the sovereign is absent.”); *id.* at 136 (“The text alone is present in normal politics, and therefore no organ of the government is authorized to speak in the name of the people. The sovereign people are not present.”); *cf.* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”).

119. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

120. U.S. CONST. art. V. Two-thirds of the states may also call a convention to propose amendments, and ratification may also be by convention in three-fourths of the states. *Id.*

The risk of judicial review, whereby courts interpret and apply both constitutional and statutory law, is that it may give license to courts to make changes to such law outside the normal democratic process.¹²¹ The risk is far worse absent clear standards of justification to guide courts, or at least to hold them accountable, when they say what law means and how it applies. If courts get it wrong, then their interpretation of law or application of law to fact subverts the democratic process.¹²² It is antidemocratic. Moreover, most constitutional change is hard to undo through the ballot box. For this reason, courts should hold themselves to a higher standard when they decide constitutional cases, as opposed to mere statutory cases. A workable approach is for courts to require something akin to a preponderance-of-the-evidence standard for statutory cases, and something more like a clear-and-convincing-evidence standard for constitutional cases.¹²³ The normative value behind this type of approach is popular sovereignty.

A full account of the complex concept of popular sovereignty is beyond the scope of this Article. Professor Keith Whittington has already offered a helpful discussion of it.¹²⁴ Whittington observes that the interpretation and application of law, especially constitutional law, should promote popular sovereignty: “Without being constrained to the interpretation and application of previously created law, the judiciary would subvert the place of the elected and accountable representatives in favor of the forceful imposition of the will of a legal aristocracy.”¹²⁵ To ensure that courts do not overstep their role in our system of separated powers, Whittington argues for standards of justification. For him, “[i]nterpretation is the translation of the constitutional text into the specifically useful formulas within which a given fact situation can be fit.”¹²⁶ He believes

121. WHITTINGTON, *supra* note 113, at 20 (“The root difficulty . . . is that judicial review is a countermajoritarian force in our system.” (quoting BICKEL, *supra* note 116, at 16)).

122. *See, e.g.*, SCALIA & GARNER, *supra* note 39, at 83 (“[A] corrosion of democracy occurs even when law-revising judges are elected, as they are in many states. The five or seven or nine members of a state supreme court, lawyers all, can hardly be considered a representative assembly.”); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803) (“[T]he legislature may [not] alter the constitution by an ordinary act.”).

123. Lawson, *supra* note 1, at 860 (noting the selection of a standard is “inescapably normative, depending heavily on the end one seeks to serve through interpretation”).

124. WHITTINGTON, *supra* note 113, at 110–59.

125. *Id.* at 40 (footnote omitted); *see also id.* at 39 (“The mistrust of government power underlying constitutionalism generally dictates that a proper interpretive theory incorporate a concern with controlling the judiciary as well as other governmental institutions.”).

126. *Id.* at 6.

the standards “must indicate a decision with a fair degree of certainty,”¹²⁷ not unlike the degree of certainty specified by standards of proof, and he views legal determinacy as a prerequisite for judicial review.¹²⁸

Whittington therefore embraces a judicial review that is restrained, but not overly so. He rejects an approach that would “constrain judicial review to the settled core of legal meaning,” because it would “shrink the core of constitutional meaning, as the clear-mistake rule of the deferential judge exchanges false positives for false negatives.”¹²⁹ Similarly, the theory in this Article rejects the beyond-a-reasonable-doubt standard of proof because that standard, like a clear-mistake rule, would place too high a burden on the proponent of a proposition of constitutional law. If courts adopted such a standard, even informally, it could seriously unsettle legal meaning or the application of that meaning to familiar fact patterns. Instead, Whittington endorses a form of judicial review that relies on standards of justification that seek to strike a balance between fixation and flexibility:

Another option . . . is to recognize that within the context of interpretation there are mechanisms for expanding the boundaries of the core legal meaning. Legal interpretation includes not only the explication of the core meaning of the law but also subsidiary rules for extending that meaning. Such interpretive guidelines are not the product of judicial additions to the law or internally included in the law itself but are constitutive of the judicial function. Thus, while avoiding reliance on moral theories of the “best” meaning of the existing law, interpreters can nonetheless decide hard cases through developing the logical implications of the settled law. This approach can be called one of seeking the “best fit” with existing law.¹³⁰

That is the approach this Article advocates, albeit with resort to burdens of proof as informal rules of thumb to guide how courts decide legal questions. Resort to burdens of proof makes sense because they entail known, familiar standards for courts to follow. This, in turn, should help to preserve a key aspect of separation of

127. *Id.*

128. *Id.* (“In order for the Constitution to be legally binding, judges must be able to determine that a given action either is or is not allowed by its terms.”); *see also id.* at 36–37 (“The difficulty comes not only in discovering [a legal] principle or in determining how best to apply it to the facts, but also in deciding how broadly to draw the principles that the constitutional text demonstrably embodies.”).

129. *Id.* at 42.

130. *Id.* (footnotes omitted).

powers by ensuring that courts do not make the law, but only interpret and apply the law to fact based on sufficient justification for the interpretation and application in question. For constitutional law, the goal is what Professor Thomas Colby calls “judicial *constraint*,” which he distinguishes from “judicial *restraint*.”¹³¹ Judicial restraint is deference to legislative majorities, which promotes democracy based on rule by a present simple majority. Judicial constraint is deference to a proper interpretation and application of higher-order law in support of constitutionalism, which upholds the law of a past supermajority over the law of a present simple majority only insofar as the two conflict. As Whittington put it, judicial constraint “does not require judges to get out of the way of legislatures,” but does require them “to uphold the original Constitution—nothing more, but also nothing less.”¹³² For Whittington, the original Constitution is found through proper interpretation and application. But the question remains: How do courts know if their interpretation and application of law is proper?

While there is no precise calculation or formula to guide the interpretive process, and although that process requires a great deal of judgment, this Article argues that burdens of proof can help guide courts to strike the right balance between constitutionalism over time and democracy in the moment. If we ask courts to consider more explicitly the varying standards by which they accept legal propositions in constitutional and statutory cases, that balance may be better achieved. Whittington notes that judges should “defend constitutionalism as far as they are able” but, where interpretive methods yield “no determinate answers,” “majoritarianism holds sway beyond that point.”¹³³ Thus, where the justification for

131. Colby, *supra* note 43, at 750–51.

132. Whittington, *supra* note 114, at 609; *see also* Colby, *supra* note 43, at 751 (“New Originalists believe that the courts should sometimes be quite active in preserving (or restoring) the original constitutional meaning, but they do not believe that the courts are unconstrained . . . They are constrained by their obligation to remain faithful to the original meaning.”).

133. WHITTINGTON, *supra* note 113, at 78; *see also id.* at 37 (“Once a layer of protection is posited that can no longer be supported by the weight of historical evidence, judicial interpretation and application of that principle must stop, leaving any further protection to political construction.”); *id.* at 54 (“Alexander Hamilton relied on similar reasoning in contending that where meaning is uncertain and subject to continued dispute, the judiciary cannot reasonably act, for a court’s only claim to authority is the force of its reason and the clear accuracy of its decision.” (citing THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

an interpretation or application of constitutional law is insufficient, “there can be no action” by the judiciary.¹³⁴ As Judge Frank Easterbrook so eloquently put it, “when the framers did not create a rule, when the issue was novel, or when the original interpretive community cannot be recovered reliably, we have neither judicial review nor the feared dead hand, but democracy. That is the core of the Constitution: Modern issues are decided by elected representatives.”¹³⁵ The bottom line is that “[j]udicial review can thrive only where the text is determinate,”¹³⁶ and that judgment depends on the degree of evidence—not just historical, but also textual and logical—in favor of a particular legal proposition.¹³⁷

Whittington summarizes just how an interpretive theory should balance constitutionalism and democracy as follows:

Judges gain their authority by their institutional obligation to enforce the law established by the people against the representatives of the people, not by possessing special insight into the nature of the moral universe or by being situated so as to expand democratic values at the expense of existing representative institutions. In pursuing the will of the sovereign people, the judiciary does not act contrary to democratic values at all but upholds them by recognizing the distinction between the government and the populace that it claims to represent. In order to do so, [they] must themselves be enforcing the demonstrable will of the people.¹³⁸

That is just what the theory here attempts to do. The burdens of proof are designed to keep judges honest and on track.

E. *Extinction Versus Anti-Extinction*

In the 19th century, Professor James Bradley Thayer endorsed a “strong form of judicial deference.”¹³⁹ He argued that courts should not overturn the acts of the political branches unless those

134. *Id.* at 89.

135. Frank H. Easterbrook, *The Inaugural Scalia Lecture: Interpreting the Unwritten Constitution* at 18:09, YOUTUBE (Nov. 14, 2014), <https://www.youtube.com/watch?v=yuAyxQr2LYE> [<https://perma.cc/SCM6-HV8K>].

136. WHITTINGTON, *supra* note 113, at 89.

137. *See id.* at 45 (“In following the historical intentions of the founders, the judge can appeal to an objective and external standard that can be the subject of reasoned argument and thus restore principled judgment to politics while isolating himself from lawmaking.”).

138. *Id.* at 46; *cf. Legally Speaking*, *supra* note 89, at 18:44, 28:34 (arguing that judges make better legal historians than moral philosophers).

139. WHITTINGTON, *supra* note 113, at 36.

acts were unconstitutional beyond a reasonable doubt.¹⁴⁰ But subjecting judicial review in both constitutional and statutory cases to the highest standard of proof may render the law, or parts of it, “extinct.”¹⁴¹ The worry of extinction, however, must be offset by what might be called a motive of anti-extinction, which is an effort to keep a fixed meaning of law relevant to new and unforeseen facts in the world despite a lack of textual, historical, and logical evidence that is persuasive enough to satisfy the applicable standard of proof.

The fear is less pronounced in statutory cases, given the ease by which legislatures may amend old statutes and pass new ones. The same goes for regulations. But the fear is real in constitutional law, given the extraordinary effort it takes to amend our Constitution.¹⁴² That fear is partly attenuated insofar as the Constitution is not supposed to be the “end all, be all.” As Justice Scalia put it, the Constitution was never meant to “do everything that needs doing from age to age.”¹⁴³ If the Constitution is silent about an issue, “we have things called legislatures, and they enact things called laws. You don’t need a constitution to keep things up to date. All you need is a legislature and a ballot box.”¹⁴⁴ Although legal interpreters may differ on where the Constitution is silent, many agree that, where it is, issues are left to democratic choice. Indeed, for some, that democracy-promoting ideal is the normative basis for judicial review in the first place.¹⁴⁵

140. Thayer, *supra* note 32, at 149–50; *cf.* Lawson, *supra* note 1, at 893 (“My brief analysis suggests that something like a beyond-a-reasonable-doubt standard of proof should be imposed on anyone, whether nominally plaintiff or defendant, who seeks to invoke the coercive apparatus of the legal system to alter the status quo.”).

141. *See supra* notes 36–43 and accompanying text.

142. *See supra* note 120 and accompanying text; *cf.* Lawson, *supra* note 1, at 881 (“[W]hen the immediate consequences of a particular factual finding can be the incarceration (or execution) of a defendant, a higher threshold is required for the proof of facts than when the immediate consequences can only be the seizure of the defendant’s property.”).

143. Scalia, *supra* note 85, at 47.

144. *Legally Speaking*, *supra* note 89, at 17:18.

145. *See, e.g.*, SCALIA & GARNER, *supra* note 39, at 82–83 (arguing originalism is the only approach compatible with democracy because giving law a new meaning is the same as changing it, “and changing written law, like adopting written law in the first place,” is for the legislature and executive, not the courts); Scalia, *supra* note 85, at 22 (arguing non-originalism is “not compatible with democratic theory”); William H. Rehnquist, *The Notion of A Living Constitution*, 54 TEX. L. REV. 693, 706 (1976) (arguing, insofar as it imposes a rule “the voters have not and would not have embodied in the Constitution,” living constitutionalism is “genuinely corrosive of the fundamental values of our democratic society”); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 111 (1989) (“[J]udicial obligation

Legal interpreters should fear falling on the wrong side of the divide between extinction and anti-extinction.¹⁴⁶ Those who fear extinction wish to avoid false negatives, by which the judicial branch does not invalidate the acts of the political branches when proof and reason warrant invalidation under fundamental law. Those who fear anti-extinction seek to avoid false positives, by which the judicial branch invalidates executive and legislative acts when proof and reason do not warrant invalidation. The choice of a standard based on clear and convincing evidence is an attempt to strike a proper balance in constitutional cases. A proof-beyond-a-reasonable-doubt standard would risk false negatives and thus an unacceptable degree of extinction, whereas a preponderance-of-the-evidence standard would risk false positives and thus an improper level of anti-extinction. However, in today's world of rapid change, especially through scientific discovery and technological innovation, courts may worry more about not doing enough to vindicate old constitutional rights vis-à-vis new and unforeseen facts. They may fret over whether the original meaning of those rights has any relevance in a world that looks less and less like that of the framing generation. If they cannot somehow extend the old to the new, will they allow constitutional rights, in particular, to go the way of the dinosaurs?

Original application is more likely than unoriginal application to meet the standard of proof. But unoriginal applications abound, and many enjoy solid supporting evidence. Start with the First Amendment freedom of speech. Over the past century, the Supreme Court has held that the freedom protects more and more novel forms of expression, from print media,¹⁴⁷ to cinema,¹⁴⁸ to broadcast media like radio and television,¹⁴⁹ to cable television,¹⁵⁰

to obey enacted law is the means by which the power of the political community to make . . . group decisions is realized.”).

146. See Lawson, *supra* note 1, at 876 (“[A] beyond-a-conceivable-doubt standard will render any legal theory wholly indeterminate, while a beyond-a-rational-doubt standard will put a pretty good dent in most of them.”).

147. *Lovell v. City of Griffin*, 303 U.S. 444, 450–52 (1938) (pamphlets).

148. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (stating “expression by means of motion pictures is included within the free speech and free press guaranty”).

149. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400–01 (1969) (granting less protection for radio and, by extension, television because of scarcity of broadcasting frequencies); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226–27 (1943) (radio).

150. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 667–68 (1994).

all the way up to the Internet.¹⁵¹ The Court has also held that the Second Amendment right to keep and bear arms protects not only colonial pistols and muskets, but also modern-day handguns and rifles.¹⁵² The Court suggested the term “arms” refers to an open category that does apply, as a threshold, to newly invented arms.¹⁵³ It has also held that the use of new technologies constitutes a search within the meaning of the Fourth Amendment. That was true of wiretapping,¹⁵⁴ aerial surveillance,¹⁵⁵ thermal imaging,¹⁵⁶ GPS trackers,¹⁵⁷ and cell-phone data.¹⁵⁸

Application of old law to the novel fact patterns above seems warranted by proof and reason even under a clear-and-convincing-evidence standard. Indeed, some unoriginal applications appear to meet that standard more easily than others. An example is the unoriginal application of the Sixth Amendment confrontation right to eyewitnesses who give statements to police at a stationhouse,¹⁵⁹ or

151. *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

152. *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (“[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”); *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007) (“The modern handgun—and . . . rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon . . .”), *aff’d sub nom. Heller*, 554 U.S. 570.

153. *Heller*, 554 U.S. at 582; *see also* Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 445–46 (1934) (“Suppose a legislator enacts that it shall be a crime for anyone ‘to carry concealed on his person any dangerous weapon.’ After the statute is passed someone invents a machine, no larger than a fountain pen, capable of throwing a ‘death ray.’ Is such a machine included? Obviously, yes.”).

154. *Katz v. United States*, 389 U.S. 347, 358–59 (1967), *overruling Olmstead v. United States*, 277 U.S. 438 (1928).

155. *See Florida v. Riley*, 488 U.S. 445, 450–51 (1989) (plurality opinion) (considering whether a helicopter flyover at 400 feet constituted an unreasonable search). *But see id.* at 455 (O’Connor, J., concurring) (“[P]ublic use of altitudes lower than that—particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations.”).

156. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

157. *United States v. Jones*, 565 U.S. 400, 404–13 (2012); *see also* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 531 (2011) (noting that Justice Scalia uses “an originalist method that ensures that the privacy protection at the time of the Framing is not eroded by technology”). *But see* DAVID A. STRAUSS, *THE LIVING CONSTITUTION 2* (2010) (arguing that an “unchanging Constitution . . . would be ignored or, worse, it would be a hindrance” to American society).

158. *Riley v. California*, 573 U.S. 373, 403 (2014).

159. *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

crime scene.¹⁶⁰ But the unoriginal application of that right to forensic experts, who perform tests on drugs,¹⁶¹ blood,¹⁶² and now DNA,¹⁶³ appears to be far less certain and justified.

All of the above rights-granting clauses of the Constitution have been incorporated against the states.¹⁶⁴ All of them apply identically to the states as they do to the federal government.¹⁶⁵ But the last question—application of the confrontation right to forensic experts—seems especially hard. It is that question that we consider next.

II. ORIGINAL AND UNORIGINAL APPLICATIONS OF THE CONFRONTATION RIGHT

This Part discusses the growing controversy over the interpretation and application of the Sixth Amendment Confrontation Clause. After surveying several original applications of the confrontation right, the discussion offers a more detailed review of the unoriginal application of the right to forensic experts. That unoriginal application has sharply divided the Supreme Court and has resulted in inconsistent results that undermine the criminal justice system in profound ways, as set forth below.

160. *Davis v. Washington*, 547 U.S. 813, 829–32 (2006).

161. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009).

162. *Bullcoming v. New Mexico*, 564 U.S. 647, 664–65 (2011).

163. *See Williams v. Illinois*, 567 U.S. 50 (2012). In *Williams*, four Justices held that DNA evidence was not offered for its truth and, even if it were, was not subject to confrontation because it did not accuse a targeted individual. *Id.* at 56–86 (plurality opinion); *id.* at 86–102 (Breyer, J., concurring). Four Justices disagreed and thought it was testimonial. *Id.* at 118–41 (Kagan, J., dissenting). Justice Thomas agreed the evidence was not subject to confrontation because it was not formalized. *Id.* at 103–18 (Thomas, J., concurring in the judgment).

164. Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159, 160–61 (2012) (noting that only the Fifth Amendment grand jury right, the Sixth Amendment criminal jury unanimity requirement, and the Seventh Amendment civil jury trial right remain unincorporated).

165. The “incorporated Bill of Rights protections apply identically to the States and the Federal Government” based on the protections’ original meaning in 1791, when the Bill of Rights was adopted, rather than in 1868, when the Fourteenth Amendment was adopted. *See McDonald v. City of Chicago*, 561 U.S. 742, 766 & n.14 (2010).

A. *Pre-Crawford*

The Confrontation Clause guarantees a criminal defendant the right “to be confronted with the witnesses against him.”¹⁶⁶ It was adopted in 1791.¹⁶⁷ A century later, in 1879, the Supreme Court interpreted and applied the Clause for the first time.¹⁶⁸ It held that, if a witness is absent from a criminal trial by the defendant’s “own wrongful procurement,” the defendant may not invoke the confrontation right to prohibit use of the witness’s former testimony.¹⁶⁹ In so holding, the Court cited English cases from as far back as 1666.¹⁷⁰ Original meaning was also important when, in 1895, the Court allowed the admission of testimony from a defendant’s first trial at his second trial because the defendant had an opportunity to cross-examine witnesses who had testified at the first trial but had died before the second trial. Once again relying on English precedents, the Court reasoned:

We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta.¹⁷¹

But another century later the Court strayed from original meaning when, in 1980, it subjected the admission of hearsay from witnesses in a criminal proceeding to a new reliability test that would have been unknown to the framing generation that adopted the Confrontation Clause.¹⁷² Under that test, hearsay could be admitted against a defendant if it bore “indicia of reliability,” which was satisfied if it fell within a “firmly rooted hearsay exception” or included “particularized guarantees of trustworthiness.”¹⁷³ That was the rule until 2004, when Justice Scalia announced for a 7–2 majority of the Court that the time had come to return to the original

166. U.S. CONST. amend. VI.

167. *Id.*

168. *See Reynolds v. United States*, 98 U.S. 145, 158–61 (1879).

169. *Id.* at 158.

170. *Id.* at 158 (citing, *inter alia*, Lord Morley’s Case (1666) 84 Eng. Rep. 1079, Kel. 53 (K.B.)).

171. *Mattox v. United States*, 156 U.S. 237, 243 (1895).

172. *See generally Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004).

173. *Id.* at 66.

meaning of the Clause.¹⁷⁴ The case was *Crawford v. Washington*, and it marked a turning point in confrontation jurisprudence.

B. *Post-Crawford*

In *Crawford*, Justice Scalia said the prior reliability test was both unpredictable and unhistorical.¹⁷⁵ After examining the historical abuses that motivated the adoption of the Confrontation Clause, he interpreted the Clause to target “testimonial statements,” though that phrase appears nowhere in the text of the Clause.¹⁷⁶ Under the testimonial test, hearsay could be admitted against a criminal defendant if it satisfied common-law requirements for admitting former testimony: (1) the hearsay declarant must be unavailable to testify in person at trial; and (2) the defendant must have had a prior opportunity to cross-examine him or her.¹⁷⁷ The understanding hinged on the interpretation of the term “witnesses” in the Clause. Scalia said the term simply refers to those who “bear testimony,” which in turn is a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”¹⁷⁸ He left “for another day any effort to spell out a comprehensive definition of ‘testimonial.’”¹⁷⁹ Chief Justice William Rehnquist, in a separate opinion joined by Justice Sandra Day O’Connor, warned that the majority’s focus on “testimonial statements” was too vague and left “parties . . . in the dark” about which witnesses are (and are not) subject to confrontation.¹⁸⁰

The Chief’s warning proved prescient. *Crawford* itself was a relatively easy case. There, Michael Crawford faced charges of assault for stabbing a victim.¹⁸¹ At trial, the prosecution did not call Crawford’s wife as a witness due to a marital privilege, but it introduced, as evidence that the stabbing was not in self-defense, a tape-rec-

174. See generally *Crawford*, 541 U.S. 36.

175. *Id.* at 62–65.

176. *Id.* at 42–53.

177. *Id.* at 53–56.

178. *Id.* at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Notably, Scalia’s majority opinion did not cite page numbers from the 1828 edition of Webster’s dictionary and, as set forth below, was imprecise in quoting it.

179. *Id.* at 68.

180. *Id.* at 75–76 (Rehnquist, C.J., concurring in the judgment).

181. *Id.* at 40 (majority opinion).

orded statement she gave to police during a custodial interrogation.¹⁸² Scalia, for the majority, held that the admission of that statement violated Crawford's confrontation right because it fell "squarely" within the "core class of testimonial statements" covered by the Confrontation Clause.¹⁸³ The reason, Scalia observed, is that the tape-recorded statement bore a "striking resemblance" to the historical abuses in England that the right sought to prevent: "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."¹⁸⁴ Justice Thomas and five other Justices agreed.¹⁸⁵ Since *Crawford*, confrontation cases have not been so easy, and Scalia and Thomas disagreed about how to apply the Clause's original meaning to new fact patterns—from other police interrogations to DNA reports.

Two years later, in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*, Scalia and Thomas began to part ways.¹⁸⁶ In *Davis*, they agreed that a woman's 911 call, which sought help in an ongoing domestic dispute, was not testimonial. But they did so on different grounds. Scalia said the 911 call was nontestimonial, as it was "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."¹⁸⁷ Thomas argued the call did not bear sufficient "indicia of formality" to implicate the confrontation right.¹⁸⁸

In *Hammon*, by contrast, Scalia wrote for the majority that accusations regarding an earlier domestic assault, made to responding police officers after they had arrived and secured the scene, were testimonial.¹⁸⁹ Scalia said that statements are testimonial where, as in that case, "the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially

182. *Id.*

183. *Id.* at 51–53.

184. *Id.* at 50–52.

185. *See id.* at 37.

186. Compare *Davis v. Washington*, 547 U.S. 813, 817–34 (2006) (finding a confrontation violation in one case but not the other), with *id.* at 834–42 (Thomas, J., concurring in the judgment in part and dissenting in part) (finding no confrontation violation in either case).

187. *Id.* at 822, 828 (majority opinion).

188. *Id.* at 840 (Thomas, J., concurring in the judgment in part and dissenting in part).

189. *Id.* at 829–30 (majority opinion).

relevant to later criminal prosecution.”¹⁹⁰ Thomas again argued the statements were not formalized enough.¹⁹¹

Specifically, Thomas said the conversation between police and Hershel Hammon’s wife was not formal enough to be treated like the *ex parte* examinations of English magistrates.¹⁹² Scalia disagreed, analogizing those “examining . . . magistrates” of the past to “examining police officers” of the present.¹⁹³ He reasoned that the scope of the confrontation right should not be limited to a very formal category of testimonial statements, because “we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition.”¹⁹⁴ Significantly, Scalia issued a warning to Thomas in sharply anti-extinction terms: “Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its *extinction*.”¹⁹⁵ But Thomas replied with a warning of his own, cautioning that Scalia’s preoccupation with anti-extinction had resulted in an improper unoriginal application: “[T]he Court’s proposed solution to the risk of evasion is needlessly over-inclusive.”¹⁹⁶ Indeed, Scalia appears motivated in his confrontation jurisprudence to prevent the Clause from going extinct or being evaded by new developments. Those developments include new rules of evidence that provide hearsay exceptions unknown to the framing generation, and new types of evidence that go beyond police interrogations and include forensic evidence.¹⁹⁷ And that motive may have caused Scalia to apply the Clause where it should not apply, such as to forensic experts.

Forensic experts were first at issue in *Melendez-Diaz v. Massachusetts*, where a jury convicted Luis Melendez-Diaz of trafficking in cocaine.¹⁹⁸ At trial, the prosecution introduced three sworn certificates of state laboratory analysts who said the material seized

190. *Id.* at 822.

191. *Id.* at 840 (Thomas, J., concurring in the judgment in part and dissenting in part).

192. *Id.*

193. *Id.* at 830 & n.5 (majority opinion).

194. *Id.* at 825–26 (emphasis omitted).

195. *Id.* at 830 n.5 (emphasis added).

196. *Id.* at 838 (Thomas, J., concurring in the judgment in part and dissenting in part).

197. See Noll, *supra* note 9, at 1961–62; see also *id.* at 1921–32 (surveying evidence-related changes since the framing).

198. 557 U.S. 305, 307–09 (2009).

by police from Melendez-Diaz was cocaine. In a 5–4 decision, the Supreme Court held that the admission of the sworn certificates violated Melendez-Diaz’s confrontation right because the analysts did not testify at trial and the certificates fell within the “core class of testimonial statements” covered by the Confrontation Clause.¹⁹⁹ Writing for the majority, Scalia reasoned that the certificates were “quite plainly affidavits: ‘declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.’”²⁰⁰ Thomas was the swing vote, concurring on the ground that the Clause applies to hearsay statements “only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”²⁰¹ The dissent argued that lab analysts were not among the “more conventional witnesses” who are subject to confrontation.²⁰²

Bullcoming v. New Mexico was even closer.²⁰³ There, a jury convicted Donald Bullcoming of aggravated driving while under the influence, which required a blood-alcohol level over 0.16.²⁰⁴ At trial, the prosecution introduced an unsworn—but signed—forensic laboratory report by one analyst, who had tested a sample of the defendant’s blood and recorded a blood-alcohol level of 0.21, through the testimony of another analyst, who had not done a test.²⁰⁵ The Court, again in a 5–4 decision, held that the Confrontation Clause does not tolerate that kind of “surrogate testimony.”²⁰⁶ Justice Ginsburg wrote for the majority. Scalia joined her opinion in full, and Thomas did so only in part.²⁰⁷ Ginsburg stated that the first analyst, by signing a certificate for the report at issue, had certified to “more than a machine-generated number” but also to the fact that he had, among other things, performed a particular test on

199. *Id.* at 309–10.

200. *Id.* at 310 (alteration in original) (quoting *Affidavit*, BLACK’S LAW DICTIONARY (8th ed. 2004)).

201. *Id.* at 329 (Thomas, J., concurring) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

202. *Id.* at 330 (Kennedy, J., dissenting). Justice Kennedy was joined by Chief Justice Roberts, as well as Justices Breyer and Alito. *Id.*

203. 564 U.S. 647 (2011).

204. *Id.* at 655–56.

205. *Id.* at 651–52, 655.

206. *Id.* at 652.

207. *Id.* at 650.

the defendant's blood pursuant to a particular protocol.²⁰⁸ The dissent argued that confrontation is satisfied where at least one forensic expert from the testing lab testifies, regardless whether that expert is the same one who performed the test.²⁰⁹

In a sense, *Melendez-Diaz* and *Bullcoming* represent the high-water mark of confrontation jurisprudence. The Supreme Court was not willing to go further and expand the "outer limits" of the Confrontation Clause in *Williams v. Illinois*, where a majority of the Justices agreed that the use of a DNA report at trial did not violate Sandy Williams's confrontation right but could not agree on a rationale.²¹⁰ At Williams's bench trial for rape, an expert witness for the prosecution relied on that report to testify that Williams's DNA matched DNA from semen in vaginal swabs taken from the victim.²¹¹ The expert had not conducted or overseen the DNA testing of the swabs; instead, she testified her state laboratory had shipped the swabs to an outside laboratory and had received them back with an accompanying DNA report.²¹² The prosecution introduced shipping manifests to establish the chain of custody.²¹³ The defendant objected on confrontation grounds, asserting the report contained testimonial statements from lab technicians who had performed the DNA testing.²¹⁴ The state trial court disagreed, and the Illinois Court of Appeals and Illinois Supreme Court affirmed.²¹⁵

The U.S. Supreme Court also affirmed, albeit in a deeply fractured set of opinions. No rationale commanded support from a majority of the Court. Justice Alito, in a plurality opinion joined by Chief Justice Roberts and Justices Kennedy and Breyer, presented two independent rationales. First, the plurality determined that "this form of expert testimony does not violate the Confrontation

208. *Id.* at 659–60.

209. *Id.* at 674–75 (Kennedy, J., dissenting). Justice Kennedy was once again joined by the Chief, Breyer, and Alito. *Id.* at 674.

210. *See* 567 U.S. 50, 56–86 (2012) (plurality opinion) (finding, *inter alia*, that the DNA report was not subject to confrontation because it did not accuse a targeted individual); *id.* at 86–102 (Breyer, J., concurring) (joining plurality in full); *id.* at 103–18 (Thomas, J., concurring in the judgment) (concluding that the report was not formalized enough to implicate confrontation).

211. *Id.* at 56 (plurality opinion).

212. *Id.*

213. *Id.* at 61.

214. *Id.*

215. *Id.* at 61, 64.

Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted.”²¹⁶ The plurality argued that the expert used the DNA report only to establish that it contained a DNA profile and, specifically, did not testify as to the accuracy of the profile that was used to match Williams’s DNA.²¹⁷ The plurality concluded that the report therefore was not offered for the truth of what it asserted, but only for the limited purpose of producing a match.²¹⁸ Second, the plurality argued that, even if the report had been offered for the truth of what it asserted, it still would not violate the Clause because it did not contain out-of-court statements having “the primary purpose of accusing a targeted individual of engaging in criminal conduct.”²¹⁹ The argument was that the primary purpose of the report was not to gather evidence against Williams but to apprehend a dangerous criminal.

Justice Thomas, in a separate opinion, said the report did not implicate the confrontation right, as the report did not contain “formalized statements bearing indicia of solemnity.”²²⁰ Justice Elena Kagan, in a dissenting opinion joined by Justices Scalia, Ginsburg, and Sonia Sotomayor, argued that the report was subject to the Confrontation Clause because, under the Court’s prior precedents, the report contained “testimonial statements” made to prove facts at a later criminal prosecution, rather than to help police meet an ongoing emergency.²²¹

Presumably, Scalia and other *Williams* dissenters would have required the prosecution to call as trial witnesses one or more lab technicians who personally participated in the DNA testing behind the report at issue.²²² But would it make sense, based on the Confrontation Clause’s text and history, to require the live, in-court

216. *Id.* at 57–58.

217. *Id.* at 76, 79.

218. *Id.* at 70–81.

219. *Id.* at 81–86.

220. *Id.* at 103–18 (Thomas, J., concurring in the judgment).

221. *Id.* at 118–41 (Kagan, J., dissenting) (relying on *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Michigan v. Bryant*, 562 U.S. 344 (2011); and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011)).

222. Justice Sotomayor, however, has suggested that the prosecution may satisfy confrontation by calling as a trial witness “a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.” *Bullcoming*, 564 U.S. at 672

testimony of some or all of the technicians who participate in a complex, multi-step testing process? The technicians often perform nothing more than discrete, ministerial, even perfunctory tasks at each step in the process; and, because they perform hundreds or thousands of tests on anonymous samples that are often identified only (or primarily) by barcodes or other non-personally identifying information, they are unlikely to remember a given test. How, as a practical matter, could confrontation be even remotely meaningful under those circumstances? If it is not, how could one argue, as a historical matter, this is the confrontation the framers had in mind? That is, how could one argue that technicians are “witnesses” within the meaning of the Confrontation Clause?

It appears the Supreme Court’s confrontation jurisprudence has gone awry, and Scalia bears much of the blame. Had he and other Justices relied on burdens of proof, they might have realized that the unoriginal application of the Confrontation Clause to forensic experts is simply not warranted by clear and convincing “evidence,” as set forth in detail in the next Part.

III. “EVIDENCE” FOR UNORIGINAL APPLICATION OF THE CONFRONTATION RIGHT TO FORENSIC EXPERTS FALLS SHORT OF CLEAR AND CONVINCING

This Part argues that, while unoriginal applications of the confrontation right to new hearsay declarants may be warranted in some cases, it simply is not warranted as to forensic experts. The “evidence,” including textual, historical, and logical clues, is not clear and convincing enough to justify that unoriginal application. The basis for the unoriginal application—*Crawford*—is fraught with interpretive errors and logical fallacies, which have been magnified as courts attempt to apply the confrontation right to hearsay declarants who resemble less and less the eyewitnesses who accused criminal defendants when the Confrontation Clause was drafted and adopted in the 18th century. That, in turn, undermines efforts to justify—by clear and convincing evidence—the unoriginal application of the confrontation right to forensic experts.

(Sotomayor, J., concurring in part); see also *Williams*, 567 U.S. at 134 n.4 (Kagan, J., dissenting) (noting testimony from “zero” analysts—not “twelve,” “six,” “three,” or even “one”—from the laboratory that had performed the DNA test).

Justice Scalia, as *Crawford*'s author, deserves much of the blame. As a textualist-originalist, he should have been more disciplined by the text and history of the Confrontation Clause. As a jurist who rested his interpretive philosophy largely on the normative value of popular sovereignty, he should have been more deferential to popularly elected actors, including district attorneys who prosecute crimes and state legislatures that adopt evidentiary rules.²²³ He need not have been Thayerian in his level of deference,²²⁴ but one could reasonably expect him to have proceeded more cautiously, exercised greater care in his analysis, and taken pains to use interpretive canons and logical rules as rigorously and transparently as possible.²²⁵

But that is not what Scalia bequeathed to us in *Crawford*, which set the stage for misapplication of the confrontation right to forensic experts. The confrontation jurisprudence he left behind hinges on kinds of *statements*, rather than, in the words of the Confrontation Clause, kinds of “witnesses.” He defined the term “witnesses” as those who make “testimonial” statements; and, in *Davis* and *Hammon*, he refined that definition to include statements made with the primary purpose of establishing facts for later prosecution, but not with the primary purpose of enabling authorities to resolve an ongoing emergency.²²⁶ Yet that refinement does not go nearly far enough and, not surprisingly, has engendered increasing division on the Court as to whether the confrontation right applies to those who prepare forensic affidavits,²²⁷ forensic reports,²²⁸ and DNA evidence.²²⁹

With minor exceptions, the Court has accepted the unoriginal application of the confrontation right to forensic experts. That has

223. As a general rule, legislatures have the authority “to establish, modify, and control rules of evidence to the extent that such rules are not in conflict with the constitution or with rights guaranteed by it,” though they often delegate at least some of that authority to the judiciary. See 16 C.J.S. *Constitutional Law* § 301 (2017).

224. See *supra* notes 139–40 and accompanying text.

225. “Originalists who ground their commitment to originalism in notions of popular sovereignty can be expected to favor principles of construction that reflect this normative commitment.” Barnett, *supra* note 104, at 70. For example, such originalists “could say that, whenever the text is vague, legislatures have a free choice in borderline cases and cannot be second-guessed by judges.” *Id.* at 69.

226. See *supra* notes 186–90 and accompanying text.

227. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

228. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

229. *Williams v. Illinois*, 567 U.S. 50 (2012).

imposed burdens on our criminal justice system by driving up prosecution costs,²³⁰ sometimes allowing guilty defendants to go free where forensic experts are unable to testify,²³¹ and oftentimes failing to ensure that forensic evidence is reliable because confrontation generally is not as meaningful as scrutinizing the chain of custody and retesting the sample or specimen at issue.²³² Of course, we must bear those burdens if that is what confrontation fairly requires, but reasons exist to question whether it does require those burdens, especially under a clear-and-convincing-evidence standard.

Scalia read the Confrontation Clause to apply to “testimonial” but not “nontestimonial” statements, even though neither term appears in the text of the Clause. He framed the testimonial–nontestimonial distinction as follows:

Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.²³³

That distinction has led Scalia to take strikingly contradictory positions in similar confrontation cases over time. For example, in the 2015 case of *Ohio v. Clark*, the Supreme Court unanimously

230. See, e.g., *United States v. Inadi*, 475 U.S. 387, 399 (1986) (“[A]n unavailability rule places a significant practical burden on the prosecution.”); Brief for Respondent, *White v. Illinois*, 502 U.S. 346 (1992) (No. 90-6113), 1991 WL 527595, at *25–26 (noting that “an unavailability rule . . . would prevent [an] efficient and effective prosecution”).

231. See, e.g., Jesse J. Norris, *Who Can Testify About Lab Results After Melendez-Diaz and Bullcoming?: Surrogate Testimony and the Confrontation Clause*, 38 AM. J. CRIM. L. 375, 375 (2011) (“[B]anning [surrogate testimony] altogether could result in defendants going free whenever the forensic analyst is unavailable and the test cannot be repeated.”).

232. See, e.g., Sean K. Driscoll, *“I Messed Up Bad”: Lessons on the Confrontation Clause from the Annie Dookhan Scandal*, 56 ARIZ. L. REV. 707, 729 (2014) (arguing the “crucible of cross-examination” is not as useful for forensic evidence as the “centrifuge of retesting”); Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 10 (2009) (noting that “mischaracterization of the underlying data cannot be known without retesting or reexamination of the underlying forensic evidence”); Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791, 818 (1991) (discussing “the importance of retesting” in forensics).

233. *Davis v. Washington*, 547 U.S. 813, 822 (2006) (emphases added). The Court expanded the nontestimonial category by adopting a broader view of “ongoing emergency” in *Michigan v. Bryant*, 562 U.S. 344, 359–67 (2011), much to Justice Scalia’s chagrin, *id.* at 379–95 (Scalia, J., dissenting).

concluded that a three-year-old's statements to daycare teachers to the effect that his stepfather had beaten him were nontestimonial and thus did not implicate the confrontation right.²³⁴ Scalia concurred, noting the three-year-old's primary purpose "was certainly not to invoke the coercive machinery of the State against [Darius] Clark," as the child's "age refutes the notion that he is capable of forming such a purpose."²³⁵ Accordingly, under Scalia's testimonial–nontestimonial distinction, no confrontation issue could arise for most "young children."²³⁶

Scalia sang a very different tune 25 years earlier. In the 1990 case of *Maryland v. Craig*, a 5–4 majority of the Court held that the Confrontation Clause did not bar the use of a one-way, closed-circuit television to present a six-year-old's testimony that Sandra Ann Craig had sexually abused her.²³⁷ Scalia penned an impassioned dissent to the effect that the procedure violated Craig's right to confront the six-year-old girl face to face:

[Now] the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife . . . is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?" Perhaps that is a procedure today's society desires; . . . but it is assuredly not a procedure permitted by the Constitution.²³⁸

That case bothered Scalia enough that he wrote about it 7 years later in an essay, in which he emphasized framing-era assessments and argued that the Confrontation Clause should be applied today as it would have been applied during the framing era:

[C]onfrontation . . . means face-to-face, not watching from another room. And there is no doubt what one of the major purposes of that provision was: to induce *precisely* that pressure upon the witness which the little girl found it difficult to endure. It is difficult to accuse someone to his face, particularly when you are lying. Now no extrinsic factors have changed since [the Confrontation Clause] was adopted in 1791. Sexual abuse existed then, as it does now; little children were

234. 576 U.S. 237, 240–41, 250–51 (2015).

235. *Id.* at 251 (Scalia, J., concurring in the judgment).

236. *Id.*

237. 497 U.S. 836, 860 (1990).

238. *Id.* at 861 (Scalia, J., dissenting).

more easily upset than adults, then as now; a means of placing the defendant out of sight of the witness existed then as now (a screen could easily have been erected that would enable the defendant to see the witness, but not the witness the defendant). But the Sixth Amendment nonetheless gave *all* criminal defendants the right to *confront* the witnesses against them, because that was thought to be an important protection.²³⁹

Incredibly, that is the same Scalia who later concluded that children are generally incapable of forming the primary purpose to make testimonial statements. So, in a way, the veneer Scalia placed on the Clause led him to the opposite conclusion down the road as to the Clause's scope.

The most damning problem with Scalia's application of the Clause based on the testimonial–nontestimonial distinction is that the evidence does not support it. Surely, the evidence is not clear and convincing enough to justify the unoriginal application of the Clause to forensic experts when that application rests on such a thin reed. As set forth below, *Crawford* and its progeny are fraught with (a) interpretive errors and (b) logical fallacies, strongly suggesting that the textual, historical, and logical “evidence” is not clear and convincing enough to warrant such a burdensome and costly unoriginal application of the Clause to forensic experts.

A. *Interpretive Errors*

In their treatise on legal interpretation, Justice Scalia and his coauthor, legal lexicographer Bryan Garner, analyzed 57 interpretive rules: 5 fundamental principles; 11 semantic canons; 7 syntactic canons; 14 contextual canons; 7 expected-meaning canons; 3 government-structuring canons; 4 private-right canons; and 6 stabilizing canons.²⁴⁰ By the interrelating-canons principle, no canon is absolute; each is just a clue to the proper interpretation.²⁴¹ With that background, one might think Scalia would have scrupulously relied on relevant canons in his interpretation and application of the Confrontation Clause. However, starting with *Crawford*, he arguably committed several interpretive errors.

239. Scalia, *supra* note 85, at 43–44.

240. See SCALIA & GARNER, *supra* note 39, at 53–339.

241. *Id.* at 59–62 (principle of interrelating canons); see also *supra* note 73 and accompanying text.

First, consider fundamental principles. There is the principle that every application of law to fact entails interpretation.²⁴² For Scalia, the application is part and parcel of interpretation. There is the supremacy-of-text principle, by which the “words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.”²⁴³ Scalia boiled down the principle to a pithy command: “Do not depart from the words of the law.”²⁴⁴ But Scalia departed from the words of the Confrontation Clause when, in *Crawford*, he formulated the testimonial test.

The Clause secures, in its own words, the right of a criminal defendant “to be confronted with the witnesses against him.”²⁴⁵ Yet, rather than frame the issue as whether an out-of-court statement was made by or came from such “witnesses,” Scalia approached the inquiry more indirectly. He defined “witnesses” as those who “bear testimony,” and defined “testimony” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact”; he then announced that the object of the Clause was a specific type of out-of-court statement: a “testimonial” one.²⁴⁶ Scalia later elaborated that testimonial statements are those made with the primary purpose of “establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.”²⁴⁷ Sure, he derived that testimonial test from the text of the Clause, but it is several interpretive steps removed from it.

Next, consider semantic canons. Under the fixed-meaning canon, “[w]ords must be given the meaning they had when the text was adopted.”²⁴⁸ But how are legal interpreters to know what meaning the words had then? One way is for them to “consult” date-relevant dictionaries, as “the work of professional lexicographers.”²⁴⁹ Indeed, Scalia based the testimonial test in *Crawford*

242. SCALIA & GARNER, *supra* note 39, at 53–55.

243. *Id.* at 56.

244. *Id.* (translating the Latin maxim, *A verbis legis non est recedendum*).

245. U.S. CONST. amend. VI.

246. *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004) (alteration in original).

247. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

248. SCALIA & GARNER, *supra* note 39, at 78.

249. *Id.* at 415. Justice Scalia noted that it is often “exceedingly difficult to plumb the original understanding of an ancient text” because to do so properly requires “the consideration of an enormous mass of material,” “an evaluation of the reliability of that material,” and “immersing oneself in the political and intellectual atmosphere of the time.” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989). He conceded the task might in certain cases be “better suited to the historian than the lawyer.” *Id.* at 857.

largely on his use of an 1828 edition of Webster's dictionary. His one-paragraph discussion in *Crawford* is almost embarrassingly terse:

The text of the Confrontation Clause . . . applies to “witnesses” against the accused—in other words, those who “bear testimony.” “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.²⁵⁰

Notably, the Clause was adopted when the Sixth Amendment was ratified in 1791. Why then, it is fair to ask, did Scalia look for the fixed meaning of the Clause's words in a post-ratification dictionary that was not published until 1828?²⁵¹ That is 37 years after the Clause was adopted. Scalia offers no explanation whatsoever in *Crawford*. He and Garner suggested an answer when they noted in their treatise that “[d]ictionaries tend to lag behind linguistic realities—so a term now known to have first occurred in print in 1900 might not have made its way into a dictionary until 1950 or even 2000.”²⁵² That is a 50- to 100-year lag. By that standard, an 1828 dictionary could capture ordinary meaning as far back as 1778 or even 1728—enough to encompass original meaning in 1791.

In the next breadth, however, Scalia and Garner cast doubt on whether the 1828 dictionary could apply that far back. They note that, “[i]f you are seeking to ascertain the meaning of a term in an 1819 statute, it is generally quite permissible to consult an 1828

Of course, he and other originalists think that judges make better legal historians than moral philosophers. See *Legally Speaking*, *supra* note 89, at 18:44, 28:34.

250. *Crawford*, 541 U.S. at 51 (citations omitted) (quoting 2 WEBSTER, *supra* note 178).

251. The 1828 edition of Webster's dictionary has also been cited by other Justices on the Supreme Court. See, e.g., *Manuel v. City of Joliet*, 137 S. Ct. 911, 926–27 (2017) (Alito, J., dissenting) (defining “seizure”); *NLRB v. Noel Canning*, 573 U.S. 513, 527 (2014) (“recess”); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010) (“department”); *Citizens United v. FEC*, 558 U.S. 310, 428 n.55 (2010) (Stevens, J., concurring in part and dissenting in part) (“speech”); *Rothgery v. Gillespie County*, 554 U.S. 191, 221–22 (2008) (Thomas, J., dissenting) (“prosecution”). Justice Scalia cited it in nonconfrontation contexts, see, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (defining “arms”), and once described it as “late” relative to the ratification of the Bill of Rights, see *City of Boerne v. Flores*, 521 U.S. 507, 539–40 (1997) (Scalia, J., concurring in part) (“peace”).

252. SCALIA & GARNER, *supra* note 39, at 419.

dictionary.”²⁵³ So, we are left to ask: What about a 1791 provision? Is it still permissible to consult the 1828 dictionary for that? They suggest it may not be, given that, on the very next page, they specifically list the 1828 edition of Webster’s dictionary as a “useful and authoritative” dictionary to find the meaning of words between 1801 and 1850.²⁵⁴ So, by Scalia’s own account, the 1828 dictionary may be less than ideal to find the meaning of the term “witnesses” in 1791. At least Scalia should have justified his use of a post-framing dictionary to define a framing-era term as critical as “witnesses” in the Confrontation Clause.

Fortunately for Scalia, a pre-framing dictionary has the same definition of “witness” as Webster’s 1828 dictionary. Dr. Johnson’s 1755 dictionary defines the term, in the relevant grammatical sense, as “[o]ne who gives testimony.”²⁵⁵ And Scalia and Garner counted that 1755 dictionary as a “useful and authoritative” dictionary for word meanings between 1750 and 1800, which comprises the framing era.²⁵⁶ Why then, given the importance of the term “witnesses” in the Confrontation Clause, did Scalia rely on a single dictionary? After all, he and Garner acknowledged that relying on a single dictionary could lead to an incorrect reading and that, for this reason, “a comparative weighing of dictionaries is often necessary.”²⁵⁷ But Scalia did no such comparative weighing of dictionaries in *Crawford*.

Scalia may have been well advised to do so, given the historical record is arguably missing or conflicting. *Crawford* observes the framers proposed the Confrontation Clause in 1789 and the states ratified it in 1791 to guard against abuses in criminal prosecutions, primarily the use at trial of *ex parte* examinations of witnesses under English bail and committal statutes passed during the reign of Queen Mary in the 16th century.²⁵⁸ Those statutes, as well as the

253. *Id.*

254. *Id.* at 419–20.

255. *Witness*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2290 (1755), <https://johnsonsdictionaryonline.com/witness-noun/> [<http://perma.cc/2SFU-HUKH>]. In fact, Justice Scalia cited Webster’s dictionary as defining witnesses as those who “bear testimony.” *Crawford*, 541 U.S. at 51. That is not quite correct. Webster’s dictionary defines a witness, in the noun sense, as “[o]ne who gives testimony”; only in the verb sense is it defined as to “bear testimony.” 2 WEBSTER, *supra* note 178, at 115.

256. SCALIA & GARNER, *supra* note 39, at 419.

257. *Id.* at 417 (“[I]f you use a dictionary, use more than one” (quoting MICHAEL B.W. SINCLAIR, A GUIDE TO STATUTORY INTERPRETATION 137 (2000))).

258. *Crawford*, 541 U.S. at 43–44, 49–50.

procedures and proceedings under them, are called Marian (after their namesake). Scholars are divided over the specific circumstances in which testimony from a pretrial Marian proceeding could be used at trial, especially whether the use of such testimony in felony trials (as opposed to misdemeanor trials) required that a defendant have been afforded a prior opportunity to confront unavailable witnesses.²⁵⁹ According to Professor David Noll, the two sides of the debate “probably overstate the extent to which practice was settled at the framing.”²⁶⁰ To be fair, Scalia in *Crawford* recognized at least some historical conflict around the meaning of the Confrontation Clause.

Scalia’s majority opinion notes, for example, Wigmore’s view that the Clause regulates only “in-court testimony,” but asserts that such a reading “would render the . . . Clause powerless to prevent even the most flagrant inquisitorial practices.”²⁶¹ That is a serious assertion, as Wigmore has been an authority on questions related to evidence law since the early 20th century. And Noll argues that Scalia’s “assertion is incorrect” because Sir Walter Raleigh’s 1603 treason trial and other trials, which included some of the most notorious confrontation violations the framing generation sought to avoid, “involved the use of unconfrosted witness statements that were taken ‘in-court,’ or at least by an officer of the Crown.”²⁶² Noll says that applying the Clause in those cases “would have corrected ‘flagrant inquisitorial practices.’”²⁶³ He explains that Scalia, in *Crawford* and its progeny, clearly overextended the original meaning of the confrontation right out of a desire to avoid evasion of that right by changes in the rules and types of evidence:

259. Compare Davies, *supra* note 15, at 126 (arguing “the framing-era authorities show that Marian depositions of unavailable witnesses were routinely admissible in felony trials” and “were a standard feature of felony prosecutions in both framing-era England and framing-era America”), with Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 494–95, 552 (2007) (countering that statements from committal hearings were admissible at felony and misdemeanor trials only where the accused had an opportunity to confront the witness at the committal hearing, and that any uncertainty about the accused’s right to cross-examination at the committal hearing was resolved in favor of requiring cross-examination by the enactment of the Sixth Amendment).

260. Noll, *supra* note 9, at 1929 n.244.

261. *Crawford*, 541 U.S. at 50–51 (citing 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 101 (2d ed. 1923)).

262. Noll, *supra* note 9, at 1934, 1947 n.367.

263. *Id.* at 1947 n.367 (quoting *Crawford*, 541 U.S. at 51).

In the voluminous literature on the post-*Crawford* Confrontation Clause, a basic point has gone virtually unnoticed: application of the Clause to all testimonial evidence expands the Clause's scope far beyond its historical scope. At the framing, the accused's "right to be confronted with the witnesses against him" would have been understood to apply only to ordinary witnesses. Those witnesses would not necessarily have testified at trial; a witness might testify at a Marian committal hearing and fail to appear for trial, for example. But . . . the Confrontation Clause under *Crawford* applies to any evidence that incorporates a testimonial statement, regardless of whether the speaker is an ordinary witness and regardless of the context in which evidence is created. Instead of the live testimony of a witness serving as the trigger, the introduction of evidence deemed to contain "testimonial" speech triggers the right under *Crawford*. The question is why a nominally originalist decision expanded the Clause so far beyond its historical scope.²⁶⁴

Similarly, Noll says Scalia sought to ensure that the government could not simply evade confrontation by bifurcating evidence-creation and guilt-adjudication in a manner quite impossible at the framing—impossible partly because little, if any, hearsay was treated as evidence then, and partly because no professional police or forensic evidence existed then.²⁶⁵ Noll describes *Crawford* and its progeny as "an effort to regulate governmental evasion of the confrontation right."²⁶⁶ But courts should not put a thumb on the scale if the available evidence, including textual and historical evidence, simply does not amount to clear and convincing evidence in support of the unoriginal application of the confrontation right to forensic experts.

This brings us back to semantic canons. Noll says the term "witnesses" in the Confrontation Clause should mean witnesses "in the ordinary sense of the term and not what today are termed hearsay declarants."²⁶⁷ He notes that *Crawford's* testimonial test goes beyond the ordinary meaning of the term to include many hearsay

264. *Id.* at 1949 (emphasis and footnotes omitted).

265. *Id.* at 1904–05, 1976; see also Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349, 463 (2007) (discussing "the shift from the accusatorial criminal procedure of the framing-era to modern investigatory procedure and the accompanying invention and institutionalization of police departments and public prosecutor offices"); see also *Crawford*, 541 U.S. at 53 (noting that "England did not have a professional police force until the 19th century").

266. Noll, *supra* note 9, at 1906.

267. *Id.* at 1949.

declarants, even the forensic experts of *Melendez-Diaz*, *Bullcoming*, and *Williams*.²⁶⁸ That runs contrary to the ordinary-meaning canon, which holds that “[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.”²⁶⁹ Ordinarily, one does not think of forensic experts as witnesses. To require confrontation for those experts therefore appears to violate the omitted-case canon, which says “a matter not covered is to be treated as not covered.”²⁷⁰ If Noll is correct that *Crawford* and its progeny take the Confrontation Clause beyond its textual and historical moorings, why not treat forensic experts simply as an omitted case not covered by the Clause?

Finally, Scalia’s approach in *Crawford* and its progeny appears to have glossed over contextual canons. The whole-text canon states that “[t]he text must be construed as a whole.”²⁷¹ But *Crawford* appears to lose sight of not only the word “witnesses” but also the phrase “witnesses against” a criminal defendant, as stated in the Confrontation Clause.²⁷² It is not clear how forensic experts are witnesses *against* the defendant in the ordinary sense, rather than in the sense of being hearsay declarants. Also, other notable instances where the term “witness” appears in the Constitution seem to refer not to hearsay declarants but to witnesses who give in-court testimony—the very witnesses Noll referred to as witnesses in the ordinary sense.²⁷³ Thus, to read “witnesses” to apply to hearsay declarants, rather than witnesses in the ordinary sense of those who give in-court testimony, may well violate the presumption of consistent usage that a “word or phrase is presumed to bear the same meaning throughout a text,”²⁷⁴ as well as the harmoni-

268. *Id.* at 1913–14, 1949.

269. SCALIA & GARNER, *supra* note 39, at 69.

270. *Id.* at 93.

271. *Id.* at 167.

272. *But see* *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313–14 (2009) (“The text of the [Sixth] Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. . . . [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.” (footnote omitted)).

273. *See, e.g.*, U.S. CONST. art. III, § 3, cl. 1 (“No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act”); U.S. CONST. amend VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . .”). *But see* U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

274. SCALIA & GARNER, *supra* note 39, at 170.

ous-reading canon that the “provisions of a text should be interpreted in a way that renders them compatible, not contradictory.”²⁷⁵ Those are additional interpretive canons that Scalia appeared to neglect, which would undermine any attempt to argue that unoriginal application of the confrontation right to forensic experts is warranted by clear and convincing evidence.

B. *Logical Fallacies*

Several logical fallacies in the *Crawford* line of cases further undermine any attempt to justify the unoriginal application of the confrontation right to forensic experts. Curiously, in their treatise on legal interpretation, Justice Scalia and Garner never identify a separate logic canon that instructs interpreters to follow the rules of logic. Clearly, logic matters in the life of the law when lawyers argue and judges decide cases. And Scalia said it mattered to him a great deal. He described it as “the mother of consistency,”²⁷⁶ and he viewed consistency as central to the rule of law in general and, more so, to judge-pronounced determinations of the application of constitutional provisions in particular. By describing logic as the mother of consistency, he therefore appeared to view logic as a prerequisite for the rule of law, especially for constitutional interpretation. Indeed, he considered “the application of the teachings of . . . logic,” along with an insistence on consistency, as some of the only checks on the power of unelected federal judges, who enjoy life tenure, do not face voters at the polls, and hence are not as accountable through the political process.²⁷⁷

Thus, according to Scalia, judges must use logic to do their jobs—first to draw lines in a case to set forth categories, then to apply those categories in later cases to produce fair results.²⁷⁸ Scalia should have used logic in that manner when he overruled the old reliability test and replaced it with a new testimonial test.²⁷⁹ That

275. *Id.* at 180.

276. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588 (1990).

277. *Id.*; see also Antonin Scalia, *A Tribute to Chief Judge Richard Arnold*, 58 ARK. L. REV. 541, 542 (2005) (praising Judge Arnold for a style that “harkened back to another, and I think better, time, when logic and consistency were valued over desired outcome”).

278. Scalia, *supra* note 276, at 589, 593.

279. See *id.* at 589–90 (“For even as the old rationale is abandoned, a new one is announced, which forms the basis for a new scheme that is to be consistently followed.”).

is, logical rules should have guided the line he drew between testimonial and nontestimonial statements, and the way in which those categories have been applied—from the police interrogation in a stationhouse at issue in *Crawford*, to the police interrogations in the field or on-scene at issue in *Davis* and *Hammon*, and, ultimately, to the various types of forensic evidence at issue in *Melendez-Diaz*, *Bullcoming*, and *Williams*. But Scalia did not mind the rules of logic, at least not rigorously, in *Crawford* and its progeny.

The problem originates in *Crawford* itself. First, it commits the logical fallacy of affirming the consequent.²⁸⁰ At bottom, it reasons that a witness is one who gives testimony and then assumes that, if one gives testimony, one is necessarily a witness.²⁸¹ In simple terms, we could state the central thesis of *Crawford* as follows:

1. If one is a witness (*W*), one gives testimony (*T*).
2. One gives testimony (*T*).
3. Therefore, one is a witness (*W*).

That is a propositional fallacy that applies to an indicative conditional called “affirming the consequent,” whereby an argument assumes the antecedent is true if the consequent is true (If *W*, then *T*; *T*; therefore, *W*).²⁸² It is a fallacy because the antecedent may be false even if the consequent is true. Case in point: All Dalmatians are dogs, but not all dogs are Dalmatians. Just as we would be incorrect to say that one is a Dalmatian just because one is a dog, we would likewise be incorrect to say that one is a witness just because one gives testimony. Bottom line: It does not follow that one is a witness within the meaning of the Confrontation Clause simply because, and without more, one makes a testimonial statement. For example, a dying declarant makes a testimonial statement in the form of a solemn affirmation but, at English common law, was not regarded as a witness against the accused, and the dying declaration was generally admissible in a criminal trial even though the accused could not confront the dying declarant.²⁸³ Although this

280. T. EDWARD DAMER, ATTACKING FAULTY REASONING 122 (1980).

281. See *Crawford v. Washington*, 541 U.S. 36, 51–53 (2004).

282. DAMER, *supra* note 280, at 11.

283. Noll noted that two of the 18th-century English cases that Justice Scalia relied on in *Crawford* referred to a dying declarant, who testified outside the context of a Marian proceeding, not as a “witness” but as a “party” or “person.” Noll, *supra* note 9, at 1938–39, 1939 n.304 (first citing *King v. Dingler* (1791) 168 Eng. Rep. 383, 383–84, 2 Leach 561, 562–63, which referred to the dying declaration of “a party”; and then citing *King v. Woodcock*

sketch may not capture all of the nuances and subtleties of *Crawford*, the thrust of Scalia's testimonial test rests on the fallacy of affirming the consequent. As a result, the testimonial test is overbroad because some testimony may come from persons who are not witnesses for confrontation purposes.

Second, from the perspective of deductive reasoning,²⁸⁴ *Crawford* also appears to commit the fallacy of the undistributed middle.²⁸⁵ Here is how we may sketch Scalia's reasoning, again in simple terms, to illustrate how it commits that fallacy:

1. Confrontation (*C*) applies to all witnesses (*W*).
2. Witnesses (*W*) give testimony (*T*).
3. Therefore, confrontation (*C*) applies to all testimony (*T*).

But note that the middle premise is not distributed. It does not hold that all testimony comes from witnesses—that is, witnesses give *all* testimony. The above syllogism is therefore invalid, because the conclusion does not follow from its premises. Scalia may have envisioned a valid syllogism as follows, but we must supply an incorrect presupposition as a middle term:

1. Confrontation (*C*) applies to all witnesses (*W*).
2. [Witnesses (*W*) give *all* testimony (*T*).]
3. Therefore, confrontation (*C*) applies to all testimony (*T*).

The minor premise, in brackets, is unstated and presupposed. Arguably, it is also incorrect. If so, the last syllogism may be valid but unsound, because it rests on a faulty premise. If Scalia had

(1789) 168 Eng. Rep. 352, 353, which referred to that of “a person”). Notably, the two cases and others from that time and place did refer to those who testified at Marian proceedings as “witnesses.” *Id.* at 1938–39 (citing, in addition to *Dingler* and *Woodcock*, *King v. Radbourne* (1787) 168 Eng. Rep. 330, 332); *see also id.* at 1934 (“Webster [in his dictionary] contemplated that some testimony would be given by ordinary witnesses in legal proceedings and some would not. For example, he referred to the Gospels as the ‘testimony’ of God, who clearly is not a witness subject to the confrontation right.”); *cf. Crawford*, 541 U.S. at 72 (Rehnquist, C.J., concurring in the judgment) (“I am . . . not convinced that the Confrontation Clause categorically requires the exclusion of testimonial statements.”).

284. Deductive reasoning, or “top down” logic, is a process of reasoning from premises to reach a certain (not probable) conclusion. Ruggero J. Aldisert, Stephen Clowney & Jeremy D. Peterson, *Logic for Law Students: How to Think Like a Lawyer*, 69 U. PITT. L. REV. 1, 3–12 (2007); *see also Deductive Reasoning*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining deductive reasoning as “[r]easoning that begins with a general statement . . . and examines the possibilities before drawing a specific, logical conclusion,” and as a syllogism where, “[i]f the premises are true, the conclusion will be true”).

285. *See DAMER, supra* note 280, at 122.

that syllogism in mind, he left the problematic minor premise implicit. As set forth above, scholars have cited a dying declarant and others as examples of parties or persons who gave testimony but were not considered witnesses for confrontation purposes.²⁸⁶ Scalia, however, appeared to view dying declarants as witnesses who were subject to a *sui generis* exception to the confrontation right.²⁸⁷ In a footnote in *Crawford*, he dismissed dying declarants as a mere “deviation” from his testimonial test.²⁸⁸ Rather than relegate it to a footnote, he had good reason to shore up that point. But he did not. That is troubling given how heavily his testimonial test rests on whether testimony comes only from witnesses and, more so, whether or not the framing generation believed those who gave testimony outside of Marian proceedings were witnesses.²⁸⁹ As a result, confrontation cases have spurred growing division on the Court as the testimonial test has been applied to persons, including forensic experts, who bear less and less resemblance to the witnesses the framing generation had in mind when it adopted the Confrontation Clause. Not surprisingly, the testimonial–nontestimonial distinction appears in no cases before, during, or soon after that time. It seems the test was a new creation by Scalia.

Third, from the perspective of inductive reasoning,²⁹⁰ the progeny of *Crawford* appear to make an unoriginal application of the Confrontation Clause to police interrogators by fair analogy, but to forensic experts by false analogy. The issue is whether those who make out-of-court statements to police, on the one hand, or in the laboratory, on the other, are more or less like the Marian witnesses the framing generation had in mind when it adopted the Clause. Reasoning by analogy, or analogical reasoning, is a form of inductive reasoning. Analogical reasoning, as Professor Sunstein suggests, is “the most familiar form of legal reasoning.”²⁹¹ At first

286. See *supra* note 283 and accompanying text.

287. See *Crawford*, 541 U.S. at 56 n.6.

288. *Id.*

289. See *supra* note 283 and accompanying text.

290. Inductive reasoning, or “bottom up” logic, is a process of reasoning in which premises provide evidence of a probable (not certain) conclusion. See Aldisert et al., *supra* note 284, at 12–15; see also *Inductive Reasoning*, BLACK’S LAW DICTIONARY, *supra* note 284 (defining inductive reasoning as “[r]easoning that begins with specific observations from which broad generalizations are drawn,” so that, “[e]ven if the premises are true, the conclusion may be false”).

291. Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993).

blush, Sunstein notes the structure of analogical reasoning seems simple:

- (1) Some fact pattern *A* has a certain characteristic *X*, or characteristics *X*, *Y*, and *Z*;
- (2) Fact pattern *B* differs from *A* in some respects but shares characteristics [sic] *X*, or characteristics *X*, *Y*, and *Z*;
- (3) The law treats *A* in a certain way;
- (4) Because *B* shares certain characteristics with *A*, the law should treat *B* the same way.²⁹²

Here is an example that also appears simple from the confrontation context: (1) the authorities sought to obtain evidence from Marian witnesses; (2) the authorities likewise seek to obtain evidence from forensic experts; (3) the Confrontation Clause applies to Marian witnesses; and (4) because Marian witnesses and forensic experts are both sources of sought-after evidence by the authorities, the Clause should apply to forensic experts too. But that is a tad bit facile. Sunstein neatly summarized the problem:

For analogical reasoning to operate properly, we have to know that *A* and *B* are “relevantly” similar, and that there are not “relevant” differences between them. Two cases are always different from each other along some dimensions. When lawyers say there are no relevant differences, they mean that any differences between the two cases either (a) do not make a difference in light of the relevant precedents, which foreclose certain possible grounds for distinction, or (b) cannot be fashioned into the basis for a distinction that is genuinely principled. A claim that one case is genuinely analogous to another—that it is “apposite” or cannot be “distinguished”—is parasitic on conclusion (a) or (b), and either of these must of course be justified.²⁹³

Sunstein emphasizes that “[t]he major challenge facing analogical reasoners is to decide when differences are relevant.”²⁹⁴ Thus, the strength of analogical reasoning rises or falls on the relevance of similarities—and differences. There is no calculation or formula to which interpreters may turn; instead, they must exercise judgment and, one might add, a fair bit of discretion in terms of which similarities or differences they view as more or less relevant.

What emerges from the *Crawford* line of cases is a breakdown in the analogy where relevant similarities decline and relevant differences rise between Marian witnesses and the asserted “witnesses” in each case. That is what arguably has happened as the

292. *Id.* at 745.

293. *Id.*

294. *Id.*

Confrontation Clause has, over time, been applied to a station-house police interrogator in *Crawford*, to on-scene police interrogators in *Davis* and *Hammon*, and then to forensic experts in *Melendez-Diaz*, *Bullcoming*, and *Williams*. The pressing need for courts to apply the old original meaning of the Clause to new and unforeseen facts arose out of changes in both the rules and types of evidence.

First, as Noll put it, there has been a “sea change in the understanding of evidence between the framing and the present day.”²⁹⁵ During the framing era, evidence “generally consisted of witness testimony”²⁹⁶ Today, by contrast, evidence includes many sources of information beyond witness testimony.²⁹⁷ Unlike at the framing, modern evidence law has a precise definition of “hearsay”: a statement that the declarant does not make at the “current trial or hearing,” that is offered “to prove the truth of the matter asserted in the statement,” and that falls within no recognized exclusion from the hearsay rule.²⁹⁸ The Federal Rules of Evidence provide hearsay *exclusions* for a declarant’s prior testimony and an opposing party’s statement,²⁹⁹ as well as hearsay *exceptions* based on the declarant’s unavailability,³⁰⁰ and regardless of availability.³⁰¹ Given the transformation in the rules and understanding of

295. Noll, *supra* note 9, at 1905.

296. *Id.* Noll noted exceptions to the framing-era reliance on live witness testimony, such as the use of dying declarations, corroboration hearsay, and documents to establish matters as to contracts, pedigree, and land ownership. *Id.* at 1929–30.

297. *See, e.g.*, JEFFERSON L. INGRAM, CRIMINAL EVIDENCE § 2.2, at 22–28 (11th ed. 2012) (outlining forms of evidence used in modern criminal prosecutions); *see also* FED. R. EVID. 401 (defining relevant evidence as any evidence with a “tendency to make a fact [of consequence] more or less probable than it would be without the evidence”).

298. FED. R. EVID. 801(c)–(d). The rule against hearsay is at Federal Rule of Evidence 802.

299. FED. R. EVID. 801(d).

300. FED. R. EVID. 804(b)(1)–(4), (6) (setting forth former testimony, dying declaration, statement against interest, statement of personal or family history, and so-called forfeiture by wrongdoing as hearsay exceptions that depend on the unavailability of the declarant).

301. FED. R. EVID. 803(1)–(23) (setting forth a laundry list of hearsay exceptions, including for present sense impression, excited utterance, recorded recollection, record of a regularly conducted activity, and public records); *see also* FED. R. EVID. 807(a)(1)–(4) (2011) (providing old catchall exception for a statement that (1) “has equivalent circumstantial guarantees of trustworthiness,” (2) “is offered as evidence of a material fact,” (3) “is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts,” and (4) “admitting it will best serve the purposes of these rules and the interests of justice”); FED. R. EVID. 807(a)(1)–(2) (2019) (providing new catchall exception for a statement that (1) “is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence,

evidence, the Court has had to decide how the confrontation right applies, if at all, to many sources of evidence (non-ordinary witnesses) common in modern criminal prosecutions but quite unknown (as witnesses) at the framing.³⁰²

Second, and relatedly, science and technology have made possible new types of evidence that many at the framing would never have imagined.³⁰³ Forensic evidence is a perfect example. Noll has observed that, because Justice Thomas has been the swing vote in confrontation cases, and because his test for whether confrontation is necessary turns on indicia of formality and solemnity, “whether a report of forensic testing can be admitted without giving the accused an opportunity to confront the report’s author turns on the ‘formality’ and ‘solemnity’ of the document in which the report is memorialized.”³⁰⁴ Another scholar has noted changes in evidence-gathering procedures by authorities from the framing era to our modern day, with a police force that is more investigatory and professional than ever before:

During the eighteenth century, English criminal procedure was still accusatory; that is, a criminal prosecution was initiated when a private person (usually the victim, with the obvious exception of homicides) made a sworn accusation that a crime had been committed “in fact” (that is, that a felony or misdemeanor had actually—not just probably—been committed). . . . [T]he requirement of an accusation of crime “in fact” is one of the most important differences between framing-era procedure and modern investigatory procedure, in which government officers can initiate arrests and prosecutions on the basis of fairly minimal notions of “probable” crime.³⁰⁵

Given changes in the rules and types of evidence, as well as the manner in which evidence is gathered, the Confrontation Clause

if any, corroborating the statement” and (2) “is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts”).

302. Noll, *supra* note 9, at 1947.

303. *See id.* at 1912 (“One of the first problems the Court grappled with following *Crawford* was how the revitalized confrontation right applied to reports of forensic testing.”); *see also* Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POLY 791 (2007) (demonstrating that the intersection of expert testimony and *Crawford* has become a serious practical concern for lower courts).

304. Noll, *supra* note 9, at 1903 & nn.34–36 (comparing *Williams v. Illinois*, 567 U.S. 50, 103, 111 (2012) (Thomas, J., concurring in the judgment), in which Thomas was the swing vote who decided the Confrontation Clause did not apply to a DNA report because it was a “letter lacking indicia of formality,” with *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329–30 (2009) (Thomas, J., concurring), in which Thomas was the swing vote who decided the Clause did apply to a “notarized affidavit” because it was sufficiently formalized).

305. Davies, *supra* note 15, at 127 (footnotes omitted).

has found itself in a somewhat alien context. To apply the Clause to modern phenomena, we must largely analogize it to extant phenomena at the framing. But that process has gone awry, as it has focused too much on relevant similarities and not enough on relevant differences. According to Sunstein, “analogical reasoning goes wrong when there is an inadequate inquiry into the matter of relevant differences and governing principles.”³⁰⁶ At a high level, he suggests that a competent interpreter’s reasoning by analogy shares at least four characteristics: (1) “judgments about specific cases must be made consistent with one another”; (2) “analogical reasoning focuses on particulars, and it develops from concrete controversies”; (3) “analogical reasoning operates without a comprehensive theory that accounts for the particular outcomes it yields”; and (4) “analogical reasoning produces principles that operate at a low or intermediate level of abstraction.”³⁰⁷ One of the most glaring problems with the *Crawford* line of cases is that it may not share any of those characteristics.

First, the judgments in that line of cases are not entirely consistent with one another. For example, a forensic expert was at issue in *Melendez-Diaz*, *Bullcoming*, and *Williams*; the expert was held subject to the Confrontation Clause in the first two cases, *Melendez-Diaz* and *Bullcoming*, but not in the last case, *Williams*, because of what many have criticized as a less critical or relevant difference in the degree to which each document was formalized.³⁰⁸ Justice Thomas was the swing vote. He said the forensic documents were sufficiently formalized to require confrontation where they were sworn, as in *Melendez-Diaz*, or certified, as in *Bullcoming*.³⁰⁹ But he said a forensic document—a letter that reported on the results of a DNA test—was not sufficiently formalized and, therefore, did not require confrontation in *Williams*.³¹⁰ For that reason and others, commentators have described the Supreme Court’s confrontation jurisprudence as “‘incoherent,’ ‘uncertain,’ ‘unpredictable,’ ‘a train wreck,’ suffering from ‘vagueness’ and ‘double-speak,’ and, simply put, a ‘mess.’”³¹¹ More to the point, many

306. Sunstein, *supra* note 291, at 746.

307. *Id.* at 746–47.

308. See *supra* notes 198–221 and accompanying text.

309. See *supra* notes 198–201, 203–07 and accompanying text.

310. See *supra* notes 210–20 and accompanying text.

311. Kevin C. McMunigal, *Crawford, Confrontation, and Mental States*, 64 SYRACUSE L. REV. 219, 220 (2014) (footnotes omitted) (collecting citations).

scholars and judges have noted inconsistencies across the above confrontation cases.³¹²

Second, while confrontation jurisprudence has developed from concrete controversies, it has not rigorously probed which particulars across cases make individuals more or less like the Marian witnesses who fall squarely within the original meaning of the Confrontation Clause. The Clause speaks in terms of “witnesses,” and contemplates individuals, not statements. The individuals subject to the Clause share relevant similarities with each other that make them “witnesses” within the meaning of the Clause. There are also relevant differences between them and others who are clearly not “witnesses.” *Crawford* did not specify which similarities and differences are salient. It did not even elaborate on the meaning of “testimonial” within the testimonial test. Instead, it left that for *Davis* and *Hammon* later.³¹³

Third, the jurisprudence has indeed operated with an attempt—arguably unsuccessful—at a comprehensive theory of how the Confrontation Clause applies to new and unforeseen facts by virtue of the testimonial test. A comprehensive theory may sound like a virtue. Indeed, Sunstein describes incomplete theorizing as a “serious” limitation on analogical reasoning, but notes it may have the virtues of, among other things, being “the best approach available for people of limited time and capacities,” and allowing “people unable to reach anything like an accord on general principles to agree on particular outcomes.”³¹⁴ By contrast, a comprehensive theory does not always share those virtues, as seen in the growing dispute over what constitutes “testimonial” in the *Crawford* line of cases—from Justice Scalia’s emphasis on statements gathered for later prosecution,³¹⁵ to Justice Thomas’s focus on formalized statements,³¹⁶ to Justice Alito’s insistence on accusatory statements.³¹⁷ A comprehensive theory may also lack virtue if it is itself flawed. Scalia’s testimonial test, in its strained attempt to be comprehensive in scope, may be flawed in that it glosses over differences across cases that appear to be relevant.

312. See *supra* note 311 and accompanying text.

313. See *supra* notes 179, 187, 190 and accompanying text.

314. Sunstein, *supra* note 291, at 782.

315. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

316. *Id.* at 840 (Thomas, J., dissenting in part).

317. *Williams v. Illinois*, 567 U.S. 50, 82 (2012) (plurality opinion) (asking whether a statement has “the primary purpose of accusing a targeted individual”).

Fourth, the jurisprudence operates at too high a level of abstraction. In other words, Scalia's testimonial test looks to whether the primary purpose behind various statements is to establish facts for later prosecution. After *Crawford*, Scalia pitched the testimonial test as an increasingly high-level inquiry, rather than a low- or intermediate-level examination of relevant similarities and differences across the spectrum of hearsay declarants who may or may not be "witnesses" within the meaning of the Confrontation Clause. That is the very tack that enabled Scalia to gloss over relevant differences across declarants from case to case, with the result that the testimonial test may be overbroad in application due to unfair analogy. For Sunstein, analogical reasoning at such a high level of abstraction can and often does "go wrong" precisely because "one case is said to be analogous to another on the basis of a unifying principle that is accepted without having been tested against other possibilities, or when some similarities between two cases are deemed decisive with insufficient investigation of relevant differences."³¹⁸ The bottom line here is that analogical reasoning ought to occur with less abstraction and more engagement of the particular facts at hand, especially to test whether the analogy may weigh in favor of an application of law to fact by clear and convincing evidence.

Accordingly, if we delve into the details and engage the particulars, we uncover similarities and differences that may be relevant to whether certain declarants are more or less like the Marian witnesses at the heart of the Confrontation Clause's original meaning. To begin with, consider the tape-recorded, stationhouse interview of a wife by police in *Crawford*.³¹⁹ That appears to be similar to the transcribed interrogation of a Marian witness by a magistrate before and during the framing era. The similarities include:

1. the presence of state action (the police in *Crawford*, and a magistrate in Marian proceedings);
2. the custodial nature (the stationhouse before police in *Crawford*, and an audience before the magistrate in Marian proceedings);

318. Sunstein, *supra* note 291, at 757.

319. See *Crawford v. Washington*, 541 U.S. 36, 40 (2004).

3. the use of interrogation to solicit incriminating statements (the wife was questioned in *Crawford*, and a witness was likewise questioned in Marian proceedings);
4. the preservation of testimony (the wife's statements were tape-recorded in *Crawford*, and a witness's statements were transcribed or otherwise written down in Marian proceedings);
5. the formality of the process (the wife may have committed a crime if she had lied to police in *Crawford*, and a witness swore an oath under penalty of perjury in Marian proceedings);³²⁰
6. the lack of suspect anonymity (the wife knew her husband was a suspect in *Crawford*, and a witness often knew the accused was a suspect in Marian proceedings); and
7. the need for more subjective judgment (the *Crawford* interview and Marian proceedings were more subject to personal opinion and less disciplined by objective, scientific methods).

Most of those similarities seem to be quite relevant—though whether or not something is relevant is itself at least somewhat subjective. On the flipside, the few differences between the wife in *Crawford* and a witness in Marian proceedings seem less relevant and more trivial:

1. the identity of the interrogator (the wife was questioned by police in *Crawford*, and a witness was questioned by a magistrate in Marian proceedings);
2. the method of preservation of statements (the wife's statements were taped in an audio recording in *Crawford*, and a witness's statements were inked on parchment in Marian proceedings); and

320. Justice Scalia viewed formality in terms of the consequences of not telling the truth. *See, e.g., Davis*, 547 U.S. at 830 n.5 (“It imports sufficient formality, in our view, that lies to such officers are criminal offenses.”). Justice Thomas, by contrast, views formality in terms of procedural formality. *Id.* at 836–37 (Thomas, J., dissenting in part) (“Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process. Likewise, confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements . . .”). Thomas’s conception of formality tracks, somewhat, the above emphasis on the custodial nature of the process and the use of interrogation in that process.

3. the basis and procedure for soliciting statements (the wife allowed herself to be interviewed by police according to no set procedure in *Crawford*, and a witness was compelled to come before a magistrate pursuant to specific statutes and procedures in Marian proceedings).

The takeaway is that relevant similarities between the wife in *Crawford* and a Marian witness appear to far outweigh differences between them, even if we assume those differences are relevant.³²¹ So, reasoning by analogy, it seems fair to conclude the wife in *Crawford* was like a Marian witness and thus was a witness within the meaning of the Confrontation Clause.

Interactions between declarants and police in the field, rather than in a stationhouse, may or may not be the same. If no ongoing emergency exists, as the Supreme Court found in *Hammon*,³²² relevant similarities may still outweigh relevant differences. Relevant similarities may include: (1) state action (by the authorities); (2) interrogation (to solicit incriminating statements); (3) testimony preservation (in police reports and witness statements); (4) a modicum of formality (in that knowingly lying to the authorities is a crime); (5) less anonymity (because the declarant has a sense of who the suspect may be); and (6) more subjectivity (without a rigorous scientific approach).³²³ Relevant differences may include: (1) less custodial (because at or near a crime scene, rather than in a state office); (2) different interrogator (because police, rather than magistrate); (3) different basis and procedure (because non-Marian).³²⁴ The bottom line is that the declarant in *Hammon* still appears to be like a Marian witness and thus subject to confrontation. Justice Thomas's conclusion to the contrary, based on his view that the questioning in that case was relatively informal, may be an instance where a jurist's fear of false positives (application of a law when unwarranted) led him to a false negative (failure to apply

321. Scalia thought those differences were largely irrelevant. *See, e.g., id.* at 830 n.5 (majority opinion) (noting "we no longer have examining Marian magistrates," though "we do have, as our 18th-century forebears did not, examining police officers . . . who perform investigative and testimonial functions once performed by examining Marian magistrates").

322. *Id.* at 829.

323. *See generally supra* Part II.

324. *Id.*

a law when warranted).³²⁵ Indeed, Justice Scalia made that charge against Thomas in sharply anti-extinction terms.³²⁶

If, however, an ongoing emergency exists, as the Court found in *Davis*,³²⁷ relevant differences may instead outweigh relevant similarities. Similarities may be: (1) state action; (2) testimony preservation; (3) less anonymity; and (4) more subjectivity.³²⁸ Differences may include: (1) noncustodial (if 911 call or the like); (2) less interrogation (in that questions are more to solicit information about ongoing emergency than to solicit incriminating statements); (3) perhaps less formality (if 911 call or the like); (4) different interrogator (because police rather than magistrate); and (5) different basis and procedure (because non-Marian).³²⁹ Similarities and differences may be more equally balanced in number, but the fact that there is less interrogation and that the setting is noncustodial may carry added weight. Thus, the *Davis* declarant may not be enough like a Marian witness to be subject to confrontation. In sum, requiring confrontation absent an ongoing emergency in *Hammon* seems to be a fair unoriginal application based on clear and convincing justification, while dispensing with confrontation for an ongoing emergency in *Davis* may avoid unoriginal application that is unwarranted because the justification falls short of being clear and convincing.

What appears most clear is that the forensic declarants in *Melendez-Diaz*, *Bullcoming*, and *Williams* appear to have the least in common with Marian witnesses and, therefore, should arguably not be subject to confrontation. Similarities between those declarants and Marian witnesses may include: (1) state action (direct, or indirect if state authorities outsource forensic testing to private laboratories); (2) testimony preservation (but in the form of forensic reports); and (3) a modicum of formality (if declarants swear to or certify the contents of reports). Differences include: (1) noncustodial (forensic testing); (2) no interrogation (no questioning, but testing per scientific protocol); (3) more suspect anonymity (if, as is

325. See *Davis*, 547 U.S. at 840–42 (Thomas, J., dissenting in part).

326. *Id.* at 830 n.5 (majority opinion) (“Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”).

327. *Id.* at 828.

328. See generally *supra* Part II.

329. *Id.*

often true, forensic testing is done on anonymous samples);³³⁰ and (4) greater objectivity (because testing is far more disciplined by objective, scientific methods).³³¹ The bottom line is that declarants in a forensic setting seem the least like Marian witnesses and, arguably, should not be subject to the Confrontation Clause at all based on proper analogical reasoning and a lack of justification that might be considered clear and convincing.

At a high level of generality, perhaps forensic declarants are like Marian witnesses in that they create evidence against criminal defendants. If one believes, as Noll does, that the Clause's high-level purpose is to prevent the government from separating evidence-creation from guilt-adjudication,³³² then the Clause does apply to forensic declarants just as it did to Marian witnesses. But Sunstein notes that analogical reasoning ought not proceed at such a high level of abstraction.³³³ In the confrontation context, that means forensic declarants may well be different from Marian witnesses in ways that are meaningful. Thus, there is a case to be made that the Clause does not apply, by fair analogy, to forensic declarants at all. That unoriginal application is a bridge too far because the lack of logical evidence for it, to say nothing of the lack of textual and historical evidence for it, does not amount to clear and convincing evidence.

Even if there were uncertainty about proper application of the Clause to forensic declarants, one would think that jurists like Justices Scalia and Thomas would exercise constraint in the face of uncertainty.³³⁴ That is what the burden of justification would require where the standard of justification is not satisfied. In other

330. Michael A. Sabino & Anthony Michael Sabino, *Confronting the "Crucible of Cross-Examination": Reconciling the Supreme Court's Recent Edicts on the Sixth Amendment's Confrontation Clause*, 65 BAYLOR L. REV. 255, 346 (2013) ("Lab technicians often work with anonymous or coded samples of suspected contraband, blood, DNA, and so forth, nominally unaware of the identity of the individual connected to the items.").

331. Of course, examples of fraud or incompetence in forensic testing exist. *See, e.g.*, *Williams v. Illinois*, 567 U.S. 50, 118 (2012) (Kagan, J., dissenting) (describing a case from California where, "after undergoing cross-examination, the analyst realized she had made a mortifying error"). But many commentators have argued that retesting samples may generally be more effective at exposing those deficiencies than merely cross-examining forensic analysts and lab technicians. *See supra* note 232 and accompanying text.

332. Noll, *supra* note 9, at 1936 ("Insofar as Raleigh's trial exemplifies the abuses the Confrontation Clause sought to regulate, its crucial feature is the Lords' bifurcation of evidence-creation and the adjudication of guilt.").

333. Sunstein, *supra* note 291, at 747.

334. Justice Thomas, joined by Justice Scalia, exhibited more constraint through the use

words, if the Clause does not clearly apply to forensic declarants by analogy or otherwise, why not leave the decision whether to require confrontation for such declarants to democratic choice? Jurists like Scalia and Thomas ground their judicial philosophy in the view that judges should interpret the law—not make it—and that judges subvert popular sovereignty when they overstep their authority and apply the law too far beyond what its text and history reasonably permit.³³⁵ Although judges may disagree about what that text and history will *reasonably* permit, they should all recognize that application of the confrontation right to forensic declarants is neither certain nor necessarily compelled by the Clause's text and history. So, a measure of judicial constraint in this area may be prudent.

One final aspect of the Court's confrontation jurisprudence also seems illogical. In *Crawford*, Scalia wrote that the Confrontation Clause is "most naturally read as a reference to the right of con-

of qualifying words that suggested caution and modesty in an opinion that was a precursor to *Crawford* and its progeny. See *White v. Illinois*, 502 U.S. 346, 358–66 (1992) (Thomas, J., concurring in part and concurring in the judgment) (using words and phrases like "perhaps," "apparent," "may," "appears," "in some ways," "not clear," and "possible," and calling for an approach by which "the Confrontation Clause would not be construed to extend beyond the historical evil to which it was directed"); see also Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996) (arguing "judges must also adopt methodologies and principles that encourage judicial restraint"). But Thomas may have been too constrained in regard to declarants who are interviewed informally by police in the field. See *supra* note 326 and accompanying text.

335. See, e.g., Scalia, *supra* note 85, at 22 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."); Thomas, *supra* note 334, at 2 ("We judges remain today, as we were 100 years ago, or 200 years ago, bound by the will of the people as expressed by the Constitution and federal statutes.").

frontation at common law, admitting only those exceptions established at the time of the founding.”³³⁶ In subsequent cases, he considered whether relevant framing-era exceptions applied.³³⁷ But if the right itself can apply to new declarants, such as forensic experts who have much less in common with the Marian witnesses of old, does not strict adherence to framing-era exceptions lend itself to an absurd result? Forensic declarants did not exist at the framing because forensic testing had not been developed yet. So, as a matter of simple logic, no exception for them could have existed then. An exception to something that does not exist is a logical impossibility. That means a limitation on framing-era exceptions to the confrontation right makes no sense with respect to declarants, such as forensic experts, who did not exist at the framing. It is not enough to extend the right without likewise extending the exceptions,³³⁸ because new declarants who never had a chance to acquire any applicable exception may fall under the right without the benefit of any exception. The result would be absurd: New declarants, such as forensic experts who have the least in common with Marian witnesses who were the original objects of the confrontation right, will have no exceptions, whereas new declarants who have the most in common with Marian witnesses may benefit from framing-era exceptions. That seems completely backwards.

336. *Crawford v. Washington*, 541 U.S. 36, 54 (2004); *see also* *Mattox v. United States*, 156 U.S. 237, 243 (1895) (“Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected.”); *Salinger v. United States*, 272 U.S. 542, 548 (1926) (“The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions.”); *Pointer v. Texas*, 380 U.S. 400, 407 (1965) (noting exceptions to the confrontation right for dying declarations and “other analogous situations”). *But see* *Davies*, *supra* note 265, at 351 (“Although Justice Scalia endorsed formulating the Confrontation Clause to permit ‘only those [hearsay] exceptions established at the time of the founding,’ he did not follow through on identifying such exceptions in *Crawford* or *Davis*. If he had actually canvassed the framing-era evidence authorities, he would have discovered that framing-era evidence doctrine imposed a virtually total ban against using unsworn hearsay evidence to prove a criminal defendant’s guilt.” (alteration in original) (footnotes omitted) (quoting *Crawford*, 541 U.S. at 68)).

337. *See, e.g.*, *Giles v. California*, 554 U.S. 353, 358 (2008) (asking “whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right”).

338. *See* *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934) (“Nor has the privilege of confrontation at any time been without recognized exceptions, as, for instance, dying declarations or documentary evidence. The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule.” (citations omitted)), *overruled on other grounds* by *Malloy v. Hogan*, 378 U.S. 1 (1964).

Accordingly, in light of several apparent interpretive errors and logical fallacies in the *Crawford* line of cases, it seems reasonable to conclude that the unoriginal application of the confrontation right to forensic experts is not warranted by clear and convincing evidence.

CONCLUSION

The U.S. Constitution is old—centuries old. It was proposed in 1787, adopted in 1788, and amended by the Bill of Rights in 1791. The Fourteenth Amendment, by which much of the Bill of Rights has been incorporated against the states,³³⁹ was ratified in 1868. Since then, the United States has changed markedly. Consider just our scientific and technological advances. We live in a world of antibiotics, organ transplants, in vitro fertilization, stem cell research, and DNA testing. We have smartphones, hobby drones, jumbo jets, self-driving cars, GPS trackers, 3D printers, and unsurpassed interconnectedness via the Internet. Science fiction has become science fact.

Is the original meaning of our old Constitution still relevant in this brave new world? For interpreters who value both fixation (law remains fixed) and flexibility (law can account for new phenomena), application of old law to new facts may be disciplined by the use of burdens of proof as informal rules of thumb to ensure that the unoriginal application is “proven” to a specified degree of certainty by textual, historical, and logical “evidence.” Interpreters should not accept an application of law, especially an unoriginal application, where the evidence falls short of the standard of proof (whether a preponderance of the evidence, clear and convincing evidence, or another standard). If we accept an application without sufficient justification, the integrity of rule of law erodes. This is especially so for constitutional law. If a right does not fairly apply to something new, applying it to the novelty subverts popular sovereignty by removing the issue from democratic choice and not allowing the people to decide the issue for themselves.

Consider the Confrontation Clause. If it does not properly apply to forensic declarants, the Supreme Court in *Melendez-Diaz* and *Bullcoming* was not *interpreting* the Clause to apply to such declarants, but was *making* law in the form of a new constitutional

339. Thomas, *supra* note 164, at 160–61.

rule that the prosecution may not admit forensic evidence unless, in the normal course, a criminal defendant has the right at trial to cross-examine the forensic expert who developed that evidence. If so, the Court took the decision away from district attorneys and state legislators who are popularly elected. That should be anathema to those who value judicial constraint precisely because it preserves separation of powers by checking the ability of the judicial branch to intrude on the role of the legislative and executive branches of government.³⁴⁰ It is not clear whether the unoriginal application of the confrontation right to forensic experts helps the innocent in clearing their names or aids the guilty in escaping convictions whenever the prosecution is unable—economically, logistically, or otherwise—to produce forensic experts at trial.³⁴¹ Insofar as it does not help the innocent and aids the guilty, public welfare may suffer.

However, if law calls for application—original or unoriginal—a judge must have the courage to discharge a countermajoritarian duty to “stand up to . . . the popular will,”³⁴² at least the popular will of the present moment. In the criminal justice system, one of the “most significant roles” of a judge is “to protect the individual criminal defendant against the occasional excesses of that popular will”³⁴³ Not applying the law where evidence warrants the application therefore does away with that vital judicial check against mob rule. And the risk of mob rule is more pronounced for criminal defendants, who may be tried in the press long before they are ever tried in a court and thus are especially vulnerable to public demands for retribution.

This Article recommends the use of burdens of proof as informal rules of thumb to help courts strike the proper balance and make

340. See *supra* note 335 and accompanying text.

341. See, e.g., David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 82 (arguing that *Crawford* will result in “guilty defendants escaping conviction and innocent defendants [being] found guilty”). *But see* State v. Williams, 331 S.E.2d 354, 361 (S.C. Ct. App. 1985) (“Some people view the constitutional right of confrontation as merely a legal technicality or loophole in the law through which the guilty can escape just punishment. We see it otherwise. The right of an accused to be confronted by the witnesses against him is perhaps the most important constitutional right provided to people who are not guilty.”), *abrogated on other grounds*; cf. 4 WILLIAM BLACKSTONE, COMMENTARIES *352 (“[I]t is better that ten guilty persons escape, than that one innocent suffer.”).

342. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

343. *Id.*

explicit the standards of justification that warrant the interpretation and application of law under conditions of uncertainty. The goal should be neither liberally to expand nor strictly to constrict a law, but rather to get the meaning and applicability of the law just right. Admittedly, that is not easy.³⁴⁴ But the essential question is not whether a legal proposition has been proven, but whether it has been proven to a sufficient and specified degree of certainty. That is the best any practical human endeavor may hope for. It is explicitly true for factual propositions subject to stated burdens of proof, and it ought to be true, at least informally, for legal propositions too.

344. See Scalia, *supra* note 276, at 582 (“I should think that the effort, with respect to *any* statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right. Now that may often be difficult[.]”).